No. 17-43	
Title:	**Los Rovell Dahda, Petitioner** **v.** **United States**
Docketed:	July 7, 2017
Lower Ct:	United States Court of Appeals for the Tenth Circuit
Case Numbers:	(15-3236)
Decision Date:	April 4, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Jul 03 2017	Petition for a writ of certiorari filed. (Response due August 7, 2017)
Aug 02 2017	Order extending time to file response to petition to and including September 6, 2017.
Sep 06 2017	Brief of respondent United States in opposition filed.
Sep 20 2017	DISTRIBUTED for Conference of 10/6/2017.
Sep 20 2017	Reply of petitioner Los R. Dahda filed. (Distributed)
Oct 10 2017	DISTRIBUTED for Conference of 10/13/2017.
Oct 16 2017	Petition GRANTED. Justice Gorsuch took no part in the consideration or decision of this petition.
Nov 15 2017	Motion for an extension of time filed. **Main Document**
Nov 16 2017	Motion to extend the time to file respondent's brief on the merits granted and the time is extended to and including January 5, 2018.
Nov 28 2017	Blanket Consent filed by Petitioner, Los R. Dahda **Blanket Consent**

Nov 30 2017	Brief of petitioner Los R. Dahda filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 30 2017	Joint appendix filed. (Statement of costs filed) **Main Document** **Proof of Service**
Nov 30 2017	Motion to file Volume II of the joint appendix under seal filed by petitioners Los R. Dahda.
Dec 07 2017	Brief amicus curiae of Electronic Privacy Information Center filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Dec 07 2017	Brief amicus curiae of The Rutherford Institute filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 07 2017	Brief amici curiae of Electronic Frontier Foundation and National Association of Criminal Defense Lawyers filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Dec 20 2017	SET FOR ARGUMENT ON Wednesday, February 21, 2018
Jan 05 2018	CIRCULATED
Jan 05 2018	Brief of respondent United States filed. (Distributed) **Proof of Service** **Main Document**
Jan 08 2018	DISTRIBUTED for Conference of 1/19/2018.
Jan 08 2018	Motion DISTRIBUTED for Conference of 1/19/2018.
Jan 10 2018	Record requested from the U.S.C.A. 10th Circuit.
Jan 16 2018	Record from the U.S.C.A. 10th Circuit is electronic and located on PACER with the exception of the pleadings enclosed in 1 box.
Jan 22 2018	Motion to file Volume II of the joint appendix under seal GRANTED. Justice Gorsuch took no part in the consideration or decision of this motion.
Feb 05 2018	Reply of petitioner Los R. Dahda filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 21 2018	Argued. For petitioner: Kannon K. Shanmugam, Washington, D.C. For respondent: Zachary D. Tripp, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

NAME	ADDRESS	PHONE
Attorneys for Petitioner		
Kannon K. Shanmugam Counsel of Record	Williams & Connolly, LLP 725 Twelfth Street, N.W. Washington, DC 20005-5901 kshanmugam@wc.com	202-434-5000
Party name: Los R. Dahda		
Attorneys for Respondent		
Noel J. Francisco Counsel of Record	Solicitor General United States Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 SupremeCtBriefs@USDOJ.gov	202-514-2217
Party name: United States		
Other		
Erin Glenn Busby Counsel of Record	727 East Dean Keeton Street Austin, TX 78705 egbusby@swbell.net	7139660409
Party name: The Rutherford Institute		
Ilana Hope Eisenstein Counsel of Record	DLA Piper LL P (US) One Liberty Place 1650 Market Street, Suite 4900 Philadelphia, PA 19109 ilana.eisenstein@dlapiper.com	215-668-9715
Party name: Electronic Frontier Foundation and National Association of Criminal Defense Lawyers		
Marc Rotenberg Counsel of Record	Electronic Privacy Information Center (EPIC) 1718 Connecticut Ave., NW Suite 200 Washington, DC 20009 rotenberg@epic.org	202-415-6788
Party name: Electronic Privacy Information Center		

RECORD AND BRIEFS

17-43

FILED
JUL - 3 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No.

In the Supreme Court of the United States

LOS ROVELL DAHDA AND ROOSEVELT RICO DAHDA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICK E. BAILEY
CONLEE, SCHMIDT & EMERSON, LLP
200 West Douglas Avenue, Suite 300
Wichita, KS 67202

EDWARD K. FEHLIG, JR.
FEHLIG & FEHLIG-TATUM, LLC
3002 South Jefferson Avenue, Suite 207
St. Louis, MO 63118

KANNON K. SHANMUGAM
Counsel of Record
ALLISON JONES RUSHING
J. LIAT ROME
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

Library of Congress
Law Library

QUESTION PRESENTED

Whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, requires suppression of evidence obtained pursuant to a wiretap order that is facially insufficient because the order exceeds the judge's territorial jurisdiction.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statutory provisions involved 2
Statement 3
Reasons for granting the petition 11
A. The decisions below create a conflict among the courts of appeals and deepen a preexisting conflict ... 11
B. The decisions below are incorrect 17
C. The question presented is an important and recurring one that warrants the Court's review in these cases 23
Conclusion 27
Appendix A 1a
Appendix B 32a
Appendix C 59a
Appendix D 66a

TABLE OF AUTHORITIES

Cases:

Adams v. *Lankford*, 788 F.2d 1493 (11th Cir. 1986) 15, 16, 17, 26
Connecticut National Bank v. *Germain*, 503 U.S. 249 (1992) 21
Hughes Aircraft Co. v. *Jacobson*, 525 U.S. 432 (1999) 20
United States v. *Acon*, 513 F.2d 513 (3d Cir. 1975) 26
United States v. *Callum*, 410 F.3d 571 (9th Cir. 2005) 26
United States v. *Chavez*, 416 U.S. 562 (1974) ..... *passim*
United States v. *Cunningham*, 113 F.3d 289 (1st Cir. 1997) 15, 16, 26

Page

Cases—continued:

United States v. *Fudge*, 325 F.3d 910 (7th Cir. 2003) 26
United States v. *Giordano*, 416 U.S. 505 (1974) .....*passim*
United States v. *Glover*,
736 F.3d 509 (D.C. Cir. 2013).....*passim*
United States v. *Gray*, 521 F.3d 514 (6th Cir. 2008) 26
United States v. *Holden*,
603 Fed. Appx. 744 (11th Cir. 2015).....26
United States v. *Krueger*,
809 F.3d 1109 (10th Cir. 2015) 21
United States v. *Lawson*,
545 F.2d 557 (7th Cir. 1975).....15, 16, 26
United States v. *Lomeli*,
676 F.3d 734 (8th Cir. 2012).....15, 16, 26
United States v. *Moore*, 41 F.3d 370 (8th Cir. 1994).....26
United States v. *Nelson*,
837 F.2d 1519 (11th Cir. 1988).....16
United States v. *North*:
728 F.3d 429 (5th Cir. 2013).....14
735 F.3d 212 (5th Cir. 2013).....14, 15, 22
United States v. *Radcliff*,
331 F.3d 1153 (10th Cir. 2003).....8, 9, 15, 26
United States v. *Robertson*,
504 F.2d 289 (5th Cir. 1974).....15, 16, 26
United States v. *Scurry*, 821 F.3d 1 (D.C. Cir. 2016).....26
United States v. *Swann*,
526 F.2d 147 (9th Cir. 1975).....15, 16, 26
United States v. *Timmreck*,
441 U.S. 780 (6th Cir. 1979) 16
United States v. *Traitz*,
871 F.2d 368 (3d Cir. 1989) 15, 16, 26
United States v. *Vigi*,
515 F.2d 290 (6th Cir. 1975).....16, 26
Weinberg v. *United States*,
126 F.2d 1004 (2d Cir. 1942) 21

Page

Statutes and rules:

Title III, Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 ..... *passim*
18 U.S.C. 2515 ..... 2, 5
18 U.S.C. 2516 5
18 U.S.C. 2518 5
18 U.S.C. 2518(3) ..... *passim*
18 U.S.C. 2518(10) 19
18 U.S.C. 2518(10)(a) 3, 6, 13, 18, 20
18 U.S.C. 2518(10)(a)(i) ..... *passim*
18 U.S.C. 2518(10)(a)(ii) ..... *passim*
28 U.S.C. 1254(1) 2
Fed. R. Crim. P. 12.4 1
Fed. R. Crim. P. 41(b) 22

Miscellaneous:

Christopher Doval et al., *The Communications Assistance for Law Enforcement Act: An Assessment of Policy Through Cost and Application*, 32 Temp. J. Sci. Tech. & Envtl. L. 155 (2013) 25
Michael Goldsmith & Kathryn Ogden Balmforth, *The Electronic Surveillance of Privileged Communications: A Conflict in Doctrines*, 64 S. Cal. L. Rev. 903 (1991) 23
Kyle G. Grimm, *The Expanded Use of Wiretap Evidence in White-Collar Prosecutions*, 33 Pace L. Rev. 1146 (2013) 23
Mike Hurst, *Is The Long Arm of The Law Shrinking?*, 17 Federalist Soc'y Rev. 22 (Feb. 2016). 14
S. Rep. No. 1097, 90th Cong., 2d Sess. (1968) 10, 24
Gina Stevens & Charles Doyle, Congressional Research Service, 7-5700, *Privacy: An Abbreviated Outline of Federal Statutes Governing Wiretapping and Electronic Eavesdropping* (2012) 24

Page

Miscellaneous—continued:

Wiretap Report 2015 (Dec. 31, 2015) <tinyurl.com/wiretap2015> 24

In the Supreme Court of the United States

No.

LOS ROVELL DAHDA AND ROOSEVELT RICO DAHDA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners Los Rovell Dahda and Roosevelt Rico Dahda respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Tenth Circuit in these cases. Pursuant to Rule 12.4, petitioners file a single petition covering the judgments in both of their cases, as they arise from the same court and involve identical or closely related questions.

OPINIONS BELOW

The opinion of the court of appeals in *United States* v. *Los Rovell Dahda* (App., *infra*, 1a-31a) is reported at 853 F.3d 1101. The opinion of the court of appeals in *United*

States v. *Roosevelt Rico Dahda* (App., *infra*, 32a-58a) is reported at 852 F.3d 1282. The order of the district court denying petitioners' motion to suppress (App., *infra*, 59a-65a) is unreported. The magistrate judge's report and recommendation that petitioners' motion be denied (App., *infra*, 66a-76a) is also unreported.

JURISDICTION

The judgments of the court of appeals were entered on April 4, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2515 of Title 18 of the United States Code provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Section 2518(3) of Title 18 of the United States Code provides in relevant part:

> Upon * * * application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of

a mobile interception device authorized by a Federal court within such jurisdiction) * * *.

Section 2518(10)(a) of Title 18 of the United States Code provides in relevant part:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval. * * *

STATEMENT

These cases present a clear and expressly recognized circuit conflict on an important question of statutory interpretation. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 authorizes a judge to issue a wiretap order to intercept communications within the court's territorial jurisdiction and provides for suppression of communications intercepted pursuant to a facially insufficient order. The question presented here is whether the statute requires suppression of evidence obtained pursuant to a wiretap order that is facially insufficient because the order exceeds the judge's territorial jurisdiction.

Petitioners moved to suppress wiretap evidence at their criminal trial because the evidence was obtained

pursuant to a series of facially insufficient wiretap orders that authorized interception of communications outside of the issuing court's territorial jurisdiction. The district court denied petitioners' motion to suppress the evidence, App., *infra*, 59a-65a, and petitioners were convicted.

The court of appeals affirmed in relevant part in both petitioners' cases. App., *infra*, 1a-31a, 32a-58a. The court agreed with petitioners that the orders were extraterritorial and thus facially insufficient. *Id.* at 15a-20a. But the court interpreted 18 U.S.C. 2518(10)(a)(ii)—which provides for suppression of an intercepted communication if the authorizing order was "insufficient on its face"—to include an additional, unwritten requirement that, for suppression to occur, the facial insufficiency must result from a statutory violation that implicates a "core concern" underlying Title III. App., *infra*, 21a-22a. The court determined that Title III's territorial-jurisdiction limitation did not implicate a core concern of Congress in enacting the statute, and thus held that evidence obtained pursuant to the facially insufficient orders should not be suppressed. *Id.* at 21a-25a.

In so reasoning, the court of appeals acknowledged the existence of a circuit conflict on the issue whether the territorial-jurisdiction limitation implicates a core concern of Title III. App., *infra*, 21a. The court's decisions in these cases also deepen a circuit conflict on the threshold issue whether an extratextual "core concerns" requirement even applies to motions to suppress facially insufficient Title III wiretap orders. The court of appeals here erred in both respects. Because these cases present an optimal vehicle in which to resolve the conflicts on an important and recurring question of federal law, the petition for a writ of certiorari should be granted.

1. In Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, Congress established a statutory scheme under which courts may authorize governmental interception of wire, oral, and electronic communications in certain carefully delineated circumstances. The purpose of the legislation was "effectively to prohibit, on the pain of criminal and civil penalties, all interceptions of oral and wire communications, except those specifically provided for in [Title III]." *United States* v. *Giordano*, 416 U.S. 505, 514 (1974). To that end, Congress "legislated in considerable detail" concerning who may apply for a wiretap order, what circumstances justify a wiretap order, and what information must appear in the application and the order authorizing the interception. *Id.* at 515; see 18 U.S.C. 2516, 2518.

Title III also imposes limits on judicial authority to approve wiretaps. See 18 U.S.C. 2518(3)-(5). Most pertinent for present purposes, Title III, as amended, permits a judge to authorize interception of communications only "within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction)." 18 U.S.C. 2518(3).

Title III contains a statutorily mandated suppression remedy for violations of its requirements. The statute provides that, "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial * * * if the disclosure of that information would be in violation of this chapter." 18 U.S.C. 2515. Title III further provides that an aggrieved person may move to suppress the contents of any communication intercepted pursuant to the statute on

three grounds: "(i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval." 18 U.S.C. 2518(10)(a).

2. A grand jury in the District of Kansas indicted petitioners, along with 41 other individuals, on various counts arising from an alleged conspiracy to distribute large amounts of marijuana and other drugs. Before trial, petitioners moved to suppress communications intercepted pursuant to nine wiretap orders issued by the United States District Court for the District of Kansas. Those orders authorized the government to intercept communications on mobile telephones used by petitioners and three other individuals. Each wiretap order stated that, "in the event [the target telephone numbers] are transported outside the territorial jurisdiction of the court, interception may take place in any other jurisdiction within the United States." The orders did not require the target phones to be located in Kansas, nor did they require law enforcement officials to maintain their listening post in Kansas. Petitioners argued that the intercepted communications must be suppressed because the orders on their face exceeded the district court's territorial jurisdiction. App., *infra*, 1a-2a, 14a, 33a, 39a-40a, 64a, 66a n.1.

The district court referred the motion to a magistrate judge, who recommended that the court deny petitioners' motion to suppress. App., *infra*, 66a-76a. The magistrate judge believed that the wiretap orders were not improper because, although they "*permitted* interception outside this court's jurisdiction, the government did not actually

intercept cellular communications outside this court's jurisdiction." *Id.* at 72a-73a.

The district court overruled petitioners' objections and adopted the magistrate judge's report and recommendation. App., *infra*, 59a-65a. In particular, the district court noted the magistrate judge's conclusion that the wiretap orders, "as applied," did not violate Title III. *Id.* at 64a.

At trial, evidence from the wiretap orders made up "[m]uch of the evidence" against petitioners. App., *infra*, 14a, 39a. Petitioner Los Dahda was subsequently convicted of 15 counts and sentenced to 189 months of imprisonment. Petitioner Roosevelt Dahda was convicted of 10 counts and sentenced to 201 months of imprisonment.

3. The court of appeals affirmed in relevant part. App., *infra*, 1a-31a, 32a-58a.[1] The court resolved the merits of the wiretap issue in its opinion in petitioner Los Dahda's case, *id.* at 14a-25a, and then relied on that holding to reach the same conclusion in its opinion in petitioner Roosevelt Dahda's case, *id.* at 40a.

a. At the outset, the court of appeals agreed with petitioners that the wiretap orders were facially insufficient because they exceeded the district court's territorial jurisdiction in violation of 18 U.S.C. 2518(3). App., *infra*, 14a-20a. As the court explained, interception occurs "both where the tapped telephones are located and where law enforcement officers put their listening post." *Id.* at 16a-17a. Because the orders at issue "authorized interception of cell phones located outside the issuing court's territorial jurisdiction, using listening posts that were also sta-

[1] Then-Judge Gorsuch participated in the oral argument but not the decisions in these cases. App., *infra*, 1a n.*, 32a n.*.

tioned outside the court's territorial jurisdiction," the orders violated Title III. *Id.* at 17a. The court rejected the government's invocation of the statutory exception for the use of a "mobile interception device," reasoning that the exception covered only cases in which law enforcement was specifically authorized to use a "mobile device for intercepting communications." *Id.* at 20a.[2]

Despite its determination that the wiretap orders were facially insufficient, the court of appeals nevertheless held that the statute did not require suppression of the evidence obtained pursuant to those facially insufficient orders. App., *infra*, 22a-26a. While the court acknowledged that Section 2518(10)(a)(ii) provides for suppression of evidence obtained pursuant to a facially insufficient wiretap order, it asserted that suppression was required only for violation of "those statutory requirements that directly and substantially implement[] the congressional intention to limit the use of intercept procedures." *Id.* at 22a (internal quotation marks and citation omitted).

In applying that additional requirement, the court of appeals relied on its previous decision in *United States* v. *Radcliff*, 331 F.3d 1153 (10th Cir. 2003). App., *infra*, 21a. In *Radcliff*, as in these cases, the Tenth Circuit considered whether evidence obtained pursuant to a facially insufficient wiretap order must be suppressed. See 331 F.3d at 1162. The court of appeals looked to this Court's decisions in *United States* v. *Chavez*, 416 U.S. 562 (1974), and *United States* v. *Giordano*, 416 U.S. 505 (1974), which

---

[2] Effectively rejecting the district court's reasoning, the court of appeals noted that, although the calls used at trial were intercepted within the issuing court's territorial jurisdiction, "the orders would have allowed interception of calls outside the issuing court's jurisdiction" and thus were facially insufficient. App., *infra*, 20a & n.7.

considered the suppression remedy in Section 2518(10)(a)(i) for "unlawfully intercepted" communications.

In *Chavez* and *Giordano*, this Court reasoned that not every violation of Title III's requirements results in "unlawful interception" under Section 2518(10)(a)(i), or else the provision would render surplusage the other two provisions in the paragraph (including the provision for cases involving facially insufficient orders). See *Chavez*, 416 U.S. at 575; *Giordano*, 416 U.S. at 525-526. The Court therefore concluded that suppression under Section 2518(10)(a)(i) for "unlawful[] interception" was required only for "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Giordano*, 416 U.S. at 527. In *Radcliff*, the Tenth Circuit acknowledged that the Court had articulated that so-called "core concerns" requirement "with respect to motions to suppress under [Section 2518(10)(a)(i)]," but it nevertheless concluded, without explanation, that "th[e] requirement is equally applicable to motions to suppress under [Section] 2518(10)(a)(ii)" as well. 331 F.3d at 1162.

Applying the "core concerns" requirement in these cases, the court of appeals concluded that violation of the territorial-jurisdiction restriction on wiretap orders in Section 2518(3), while rendering the orders facially insufficient, did not require suppression under Section 2518(10)(a)(ii), because "the territorial defect did not directly and substantially affect a congressional intention to limit wiretapping." App., *infra*, 14a. According to the court, the concerns animating Title III were "(1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions

under which the interception of wire and oral communications may be authorized." *Id.* at 21a (quoting S. Rep. No. 1097, 90th Cong., 2d Sess. 66 (1968)).

The court of appeals determined that the privacy concern was not implicated because Section 2518(3)'s territorial-jurisdiction limitation "was not mentioned in the legislative history" of Title III. App., *infra*, 22a. And the court determined that the uniformity concern was not implicated because the territorial-jurisdiction limitation "potentially undermine[s] uniformity by requiring prosecutors in multiple jurisdictions to coordinate about how they use electronic surveillance." *Id.* at 23a. The court of appeals acknowledged that, by concluding that the territorial-jurisdiction did not implicate a "core concern" of Title III warranting suppression, it was creating a conflict with the contrary decision of the District of Columbia Circuit in *United States* v. *Glover*, 736 F.3d 509 (2013). App., *infra*, 21a.[3]

b. Judge Lucero concurred. App., *infra*, 30a-31a. He joined the majority opinion in full, but wrote separately to note that Title III is "in need of congressional attention" to address "[a]dvances in wiretapping technology." *Ibid.*

---

[3] The court of appeals rejected petitioner Los Dahda's other challenges to his convictions and sentence; however, the court vacated the fine imposed in light of the government's concession that it exceeded the statutory maximum, and it remanded for imposition of a fine below that maximum. App., *infra*, 29a-30a. Similarly, the court of appeals rejected petitioner Roosevelt Dahda's other challenges to his convictions and forfeiture, but the court vacated his sentence and remanded for resentencing because the district court erred in estimating the quantity of marijuana for which he was responsible. *Id.* at 44a-50a.

REASONS FOR GRANTING THE PETITION

These cases present a straightforward conflict in the courts of appeals on an important and recurring question of statutory interpretation. The Tenth Circuit acknowledged that its decisions in these cases were in direct conflict with a decision of the District of Columbia Circuit on the issue whether Title III's territorial-jurisdiction limitation implicates a "core concern" of the statute, with the result that suppression is warranted when the limitation is violated. The Tenth Circuit's decisions also deepen an antecedent conflict on the issue whether the extratextual "core concerns" requirement even applies to motions to suppress facially insufficient Title III wiretap orders. The Tenth Circuit's decisions cannot be justified under traditional principles of statutory interpretation or by resort to the Court's earlier decisions. These cases present the Court with the opportunity to put a stop to the lower courts' chronic, erroneous interpretation of Title III's suppression remedy. The question presented, moreover, is one of substantial and growing importance. These cases satisfy the criteria for further review, and the petition for certiorari should therefore be granted.

A. The Decisions Below Create A Conflict Among The Courts of Appeals And Deepen A Preexisting Conflict

The Tenth Circuit's decisions in these cases create a conflict among the courts of appeals on the issue whether the territorial-jurisdiction limitation implicates a "core concern" of Title III warranting suppression. The Tenth Circuit expressly recognized the existence of this conflict. App., *infra*, 21a. The decisions below, however, also deepen an existing conflict on the antecedent issue whether the "core concerns" test for suppression even applies to motions to suppress facially insufficient Title III

wiretap orders. Those conflicts warrant this Court's review.

1. As the Tenth Circuit expressly recognized, the decisions below squarely conflict with the decision of the District of Columbia Circuit in *United States* v. *Glover*, 736 F.3d 509 (2013). App., *infra*, 21a. In that case, the Federal Bureau of Investigation (FBI) obtained a wiretap order from a district judge in the District of Columbia to place an audio recording device in the defendant's truck. See 736 F.3d at 510. The government knew that the truck was parked at BWI Marshall Airport, outside the district court's jurisdiction. See *ibid.* The government therefore sought a wiretap order that would permit it to enter the truck regardless of its location. See *ibid.* The order "explicitly stated that FBI agents could forcibly enter the truck, regardless of whether the vehicle was located in the District of Columbia, District of Maryland, or the Eastern District of Virginia." *Ibid.* Because the order authorized placing an interception device on property that was not within the district court's jurisdiction at the time of the order, the D.C. Circuit concluded that the order violated Title III on its face. See *id.* at 514-515.

Turning to the remedy for that violation, the D.C. Circuit rejected the government's argument that the facial insufficiency of the order did not require suppression because Title III's territorial-jurisdiction limitation did not implicate a "core concern" of the statute. 736 F.3d at 515. In addressing that argument, the D.C. Circuit reached two dispositive holdings, both of which conflict with the Tenth Circuit's decisions in these cases: (1) the "core concerns" test does not apply to motions to suppress facially insufficient Title III wiretap orders, see *id.* at 513; and

(2) even if the "core concerns" test did apply, the territorial-jurisdiction limitation implicates a core concern of Title III, see *id.* at 515.

a. The D.C. Circuit first held that the "core concerns" test articulated in *United States* v. *Chavez*, 416 U.S. 562 (1974), and *United States* v. *Giordano*, 416 U.S. 505 (1974), for the "unlawful interception" ground for suppression in Section 2518(10)(a)(i) does not apply to the "facial insufficiency" ground for suppression in Section 2518 (10)(a)(ii). See 736 F.3d at 513. The court observed that the relationship between paragraphs (i) and (ii) of the statute "is, at first glance, rather puzzling," because it would seem that, if an authorization order was "insufficient on its face," the communication would necessarily be "unlawfully intercepted." *Ibid.*

As the court of appeals explained, however, this Court recognized in *Chavez* and *Giordano* that "a broad reading of paragraph (i) would render (ii) and (iii) redundant and 'drained of meaning.'" 736 F.3d at 513 (quoting *Chavez*, 416 U.S. at 575). Therefore, the Court "read paragraph (i) as requiring a broad inquiry into the government's intercept procedures to determine whether the government's actions transgressed the 'core concerns' of the statute, whereas [paragraph] (ii) is a mechanical test; either the warrant is facially insufficient or it is not." *Ibid.* (citing *Giordano*, 416 U.S. at 527). In short, the "core concerns" test "is a construction of the term 'unlawfully intercepted' in paragraph (i), not paragraph (ii)." *Id.* at 515.

Based on the text of Section 2518(10)(a), the D.C. Circuit proceeded to explain that "[s]uppression is the mandatory remedy when evidence is obtained pursuant to a facially insufficient warrant," leaving "no room for judicial discretion." 736 F.3d at 513. The D.C. Circuit reasoned that "applying the 'core concerns' test to paragraph (ii)

would turn the Supreme Court's approach on its head, elevating policy over text." *Ibid.* As the court explained, applying the "core concerns" test to paragraph (ii) "would actually treat that paragraph as 'surplusage'—precisely what the Supreme Court tried to avoid in *Giordano*." *Id.* at 514.

b. The D.C. Circuit next held that, even if an inquiry into the "core concerns" of Title III were required for suppression to occur under Section 2518(10)(a)(ii), "territorial jurisdiction *is* a core concern" of the statute. 736 F.3d at 515.[4] In so holding, the D.C. Circuit expressed agreement with the Fifth Circuit's original decision in *United States* v. *North*, 728 F.3d 429 (2013). In *North*, the Fifth Circuit initially held that the territorial-jurisdiction limitation of Title III implicated a "core concern" of the statute, with the result that evidence obtained pursuant to a facially insufficient wiretap order should be suppressed. But the Fifth Circuit later withdrew its original opinion and replaced it with a new opinion holding that the evidence should be suppressed on other grounds. See 735 F.3d 212, 213 (2013).

Notably, the Fifth Circuit's original opinion largely found its way into the Federal Reporter as Judge DeMoss's concurring opinion to the later decision. See Mike Hurst, *Is The Long Arm of The Law Shrinking?*, 17 Federalist Soc'y Rev. 22, 25 (Feb. 2016). Judge DeMoss would have applied the "core concerns" test to paragraph (ii), but he would have held that "the territorial jurisdiction

---

[4] The D.C. Circuit also rejected the argument that the jurisdictional flaw in the order could be "excused as a 'technical defect.'" *Glover*, 736 F.3d at 515. As the court explained, "blatant disregard of a district judge's jurisdictional limitation" cannot be considered merely "technical." *Ibid.*

limitation serves important substantive interests and implicates core concerns of the statute, despite the lack of legislative history." 735 F.3d at 218-219. He reasoned that "Title III's territorial restrictions prevent forum manipulation by law enforcement, similarly preventing wiretap authorizations in cases where investigators would otherwise be able to obtain them," which is "a significant protection of privacy." *Id.* at 219. He therefore would have concluded that "[t]erritorial limitations on a district court directly implicate Congress's intent to guard against the unwarranted use of wiretapping." *Ibid.*

2. The Tenth Circuit's decisions in these cases squarely conflict with both of the D.C. Circuit's holdings in *Glover*. What is more, other courts of appeals have applied the same "core concerns" analysis as the Tenth Circuit.

a. As the D.C. Circuit expressly acknowledged, "a number of [its] sister circuits have imported the core concerns test into paragraph (ii)" and adopted an interpretation that, in the D.C. Circuit's view, was "contrary to the plain text of the statute." *Glover*, 736 F.3d at 513. Six courts of appeals have applied some version of the "core concerns" test to the "facial insufficiency" ground for suppression in Section 2518(10)(a)(ii). See *United States* v. *Robertson*, 504 F.2d 289, 292 (5th Cir. 1974); *United States* v. *Lawson*, 545 F.2d 557, 562 (7th Cir. 1975); *United States* v. *Lomeli*, 676 F.3d 734, 739 (8th Cir. 2012); *United States* v. *Swann*, 526 F.2d 147, 149 (9th Cir. 1975) (per curiam); *Radcliff*, 331 F.3d at 1162; *Adams* v. *Lankford*, 788 F.2d 1493, 1494 (11th Cir. 1986). And three other courts of appeals have likewise held that suppression is not required for every facially insufficient wiretap order. See *United States* v. *Cunningham*, 113 F.3d 289, 293-294 (1st Cir. 1997); *United States* v. *Traitz*, 871 F.2d 368, 379 (3d

Cir. 1989); *United States* v. *Vigi*, 515 F.2d 290, 293 (6th Cir. 1975).

In each of those decisions, the courts of appeals invoked this Court's analysis of Section 2518(10)(a)(i) in *Chavez* or *Giordano* to assess a claim for suppression under Section 2518(10)(a)(ii). See *Lomeli*, 676 F.3d at 739; *Radcliff*, 331 F.3d at 1162; *Cunningham*, 113 F.3d at 293-294; *Traitz*, 871 F.2d at 379; *Adams*, 788 F.2d at 1499; *Lawson*, 545 F.2d at 562; *Swann*, 526 F.2d at 148; *Vigi*, 515 F.2d at 293; *Robertson*, 504 F.2d at 292. That approach directly contravenes the D.C. Circuit's approach in *Glover*, which focused on the plain language of the statute. See 736 F.3d at 513.

b. The Tenth Circuit also created a specific and express conflict with the second holding of the D.C. Circuit's decision in *Glover* when it held that the territorial-jurisdiction limitation in Title III did not implicate a core concern of the statute warranting suppression. App., *infra*, 21a. In support of that specific holding, the Tenth Circuit cited the Eleventh Circuit's decision in *Adams* v. *Lankford*, 788 F.2d 1493 (1986). App., *infra*, 21a. There, the Eleventh Circuit considered whether a violation of Section 2518(3)'s territorial-jurisdiction limitation constituted an error of the magnitude cognizable on a petition for habeas corpus. See 788 F.2d at 1495. Relying on this Court's habeas jurisprudence, the Eleventh Circuit determined that the relevant inquiry was "whether the asserted Title III violations are merely formal or technical errors, or whether the alleged violations implicate the core concerns of Title III." *Id.* at 1497 (citing *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979)); cf. *United States* v. *Nelson*, 837 F.2d 1519, 1527 (11th Cir. 1988) (extending that "core concerns" analysis to direct review).

Like the Tenth Circuit in the decisions below, the Eleventh Circuit looked to Title III's legislative history in deciding that the territorial-jurisdiction limitation did not implicate a core concern of the statute. See *Adams*, 788 F.2d at 1497. The Eleventh Circuit determined that the legislative history was silent "with respect to the connection, if any, between the geographical limitations" on the one hand and "the statute's concern for individual privacy" on the other. *Id.* at 1498. And like the Tenth Circuit, the Eleventh Circuit added that violation of the territorial-jurisdiction limitation actually "alleviate[d] rather than foster[ed] the divergent practices that Congress sought to prevent." *Id.* at 1499.

* * * * *

The courts of appeals are admittedly in conflict regarding the propriety of suppression under Title III. Under the current state of affairs, violation of Title III's territorial-jurisdiction limitation would automatically require suppression of the evidence in the D.C. Circuit, while the evidence would not be suppressed and could be used to convict the defendant in the Tenth Circuit (and likely also the Eleventh Circuit). Moreover, defendants in numerous other circuits must satisfy an additional "core concerns" test before their facially insufficient wiretap orders will result in suppression. The question presented in these cases implicates conflicts among the circuits, and the Court's intervention is warranted to resolve them.

B. The Decisions Below Are Incorrect

The Court's intervention is also warranted because the Tenth Circuit's reasoning is deeply flawed and is inconsistent with the Court's earlier decisions in *Chavez* and

Giordano. In refusing to order suppression of the evidence derived from the facially insufficient wiretap orders, the Tenth Circuit erred in two critical respects.

1. The Tenth Circuit erroneously concluded that evidence derived from a facially insufficient wiretap order can be suppressed under Section 2518(10)(a)(ii) only if the statutory violation "directly and substantially affect[ed] a congressional intention to limit wiretapping." App., *infra*, 14a (internal quotation marks and citation omitted). In *Chavez* and *Giordano*, the Court made clear that this so-called "core concerns" requirement was a construction only of the phrase "unlawfully intercepted" in paragraph (i). See *Glover*, 736 F.3d at 515.

Specifically, in both *Chavez* and *Giordano*, the wiretap orders were facially sufficient; from the face of the applications and orders, they appeared to comply with Title III because they stated that the applications were authorized by an Assistant Attorney General, when in fact they had been authorized by other individuals. See *Chavez*, 416 U.S. at 573-574; *Giordano*, 416 U.S. at 525 n.14. There was thus no basis for suppression under Section 2518 (10)(a)(ii), which applies only to facially insufficient orders. As a result, the question in those cases was whether violation of the statutory requirement regarding who could authorize an application rendered the resulting interceptions "unlawful" under Section 2518(10)(a)(i). See *Chavez*, 416 U.S. at 574; *Giordano*, 416 U.S. at 525.

In addressing that question, the Court recognized the potential for overlap among, and gaps within, the three paragraphs of Section 2518(10)(a). The Court explained that the "unlawful interceptions referred to in paragraph (i) must include some constitutional violations"; suppression for lack of probable cause, for example, is "not provided for in so many words" by paragraphs (ii) and (iii),

and thus must fall within paragraph (i). *Giordano*, 416 U.S. at 525-526. At the same time, however, "paragraphs (ii) and (iii) plainly reach some purely statutory defaults without constitutional overtones, and these omissions cannot be deemed unlawful interceptions under paragraph (i)," or else paragraphs (ii) and (iii) would become surplusage. *Id.* at 526.

The Court ultimately held that "paragraphs (ii) and (iii) must be deemed to provide suppression for failure to observe some statutory requirements that would not render interceptions unlawful under paragraph (i)." *Giordano*, 416 U.S. at 527; see *Chavez*, 416 U.S. at 575. At the same time, however, the Court rejected the government's argument that "no statutory infringements whatsoever are also unlawful interceptions within the meaning of paragraph (i)." *Giordano*, 416 U.S. at 527. Instead, the Court concluded, "Congress intended to require suppression [for 'unlawful interception' under paragraph (i)] where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Ibid.*

That restriction on paragraph (i)—the so-called "core concerns" test—was developed precisely in order to give meaning to each paragraph of Section 2518(10) and to avoid rendering any of them surplusage. See *Giordano*, 416 U.S. at 525-526. But by applying paragraph (i)'s construction to paragraph (ii), the Tenth Circuit (like many other courts of appeals) has rendered paragraph (ii) entirely superfluous. Limiting suppression for facial insufficiency under paragraph (ii) to situations in which the violated statutory provision "directly and substantially implements" the intent of Congress in enacting Title III as

the Tenth Circuit has done, causes paragraph (ii) to be entirely subsumed within paragraph (i). App., *infra*, 21a. That is because anything that gives rise to suppression under paragraph (ii) necessarily also does so under paragraph (i), turning this Court's analysis in *Chavez* and *Giordano* on its head. See *Glover*, 736 F.3d at 513.

What is more, the Tenth Circuit's approach simply ignores the plain text of the statute. As this Court has repeatedly stated, "in any case of statutory construction, our analysis begins with the language of the statute," and, "where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks omitted). The text of Section 2518(10)(a) establishes that suppression is the remedy where a wiretap order is "insufficient on its face," 18 U.S.C. 2518(10)(a)(ii), regardless of whether the communications were "unlawfully intercepted," 18 U.S.C. 2518(10)(a)(i).

The Tenth Circuit's reasoning negates the suppression requirement that Congress adopted by imposing an additional requirement on defendants, unmoored from the statutory text, before they can receive the remedy to which they are entitled. Judicially fashioned rules for suppression may be permissible when considering the judge-made exclusionary rule under the Fourth Amendment, but courts "must look to the statutory scheme to determine if Congress has provided that suppression is required for [a] particular procedural error" under Title III. *Chavez*, 416 U.S. at 570. Because "the statutory remedy is automatic" under Section 2518(10)(a)(ii), the failure to suppress the fruits of the facially invalid orders was erroneous. *Glover*, 736 F.3d at 516.

2. Moreover, even if the "core concerns" test did apply as a prerequisite to suppression under Section 2518

(10)(a)(ii), the Tenth Circuit erroneously concluded that Title III's territorial-jurisdiction limitation does not implicate the "core concerns" of the statute. Disregard of the territorial-jurisdiction limitation is not a mere technical violation of Title III, but rather a fatal flaw in the warrant. See *Glover*, 736 F.3d at 515.

The Tenth Circuit relied on the supposed dearth of legislative history discussing the territorial-jurisdiction limitation in holding that the limitation did not implicate the "core concerns" of Title III. App., *infra*, 21a-22a. As an initial matter, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). The territorial-jurisdiction limitation is expressly set out in Title III, see 18 U.S.C. 2518(3), and it would be particularly backwards to ignore a requirement in the plain text of a statute simply because the legislative history does not discuss the purposes of the requirement at length.

Further, it makes no sense to conclude that the territorial-jurisdiction limitation does not implicate the "core concerns" of Title III simply because no legislative history addresses it, when jurisdiction is a core concern of our entire judicial system. It is an axiomatic principle in our legal system that courts may act only within their jurisdictions. See, *e.g.*, *United States* v. *Krueger*, 809 F.3d 1109, 1125 (10th Cir. 2015) (Gorsuch, J., concurring) (noting that "our whole legal system is predicated on the notion that good borders make for good government"). Federal district courts possess extraterritorial jurisdiction only in certain exceptional circumstances. See *Weinberg* v. *United States*, 126 F.2d 1004, 1006 (2d Cir. 1942). Accordingly, where a statute fails to contain a territorial lim-

itation, one has been implied. See *ibid.* (noting that a statute authorizing the issuance of search warrants did not expressly limit the district court's powers to its own district, but that limitation "seems clearly understood, in view of the constitutional provisions and the general rule of territorial limitation"); cf. Fed. R. Crim. P. 41(b).

The territorial-jurisdiction limitation also provides a functional safeguard against the overuse of wiretap orders and limits forum shopping by prosecutors seeking wiretap authorization. See *North*, 735 F.3d at 219 (DeMoss, J., specially concurring). The Tenth Circuit reasoned that the territorial-jurisdiction limitation does not prevent forum shopping altogether because the government could still manipulate the system by using a mobile interception device or by using a listening post in the issuing court's district. App., *infra*, 23a-24a. But the court ignored the fact that the property on which a mobile interception device is placed must be located within the issuing court's district when interception is authorized. See *Glover*, 736 F.3d at 514. And forum shopping by relocating a stationary listening post is practically unlikely, because the listening post would have to be manned by agents familiar with the investigation, presumably necessitating the relocation of law enforcement. More broadly, even if the territorial-jurisdiction does not prevent forum shopping altogether, there can be no serious dispute that it limits it.

The Tenth Circuit erred by refusing to impose the statutory suppression remedy under Title III for a facially insufficient wiretap order resulting from violation of the territorial-jurisdiction limitation. This Court should grant review to resolve the circuit conflict on the propriety of suppression and reject the Tenth Circuit's erroneous interpretation.

C. The Question Presented Is An Important And Recurring One That Warrants The Court's Review In These Cases

The question presented, which has caused disuniformity in the circuits, is one of substantial legal and practical importance to the federal criminal system. These cases provide an optimal vehicle for the Court to resolve that question.

1. The question presented—whether Title III requires suppression of evidence obtained pursuant to a wiretap order that is facially insufficient because the order exceeds the judge's territorial jurisdiction—is of immense practical importance for criminal defendants. Wiretap evidence is "one of the most persuasive pieces of evidence that can be presented to a jury." Kyle G. Grimm, *The Expanded Use of Wiretap Evidence in White-Collar Prosecutions*, 33 Pace L. Rev. 1146, 1147 (2013) (Grimm). Such evidence, moreover, is often "crucial to the investigation and prosecution of large criminal conspiracies," like the sprawling conspiracy alleged here. Michael Goldsmith & Kathryn Ogden Balmforth, *The Electronic Surveillance of Privileged Communications: A Conflict in Doctrines*, 64 S. Cal. L. Rev. 903, 906 (1991). Indeed, in the instant cases, the court of appeals observed that "[m]uch of the evidence against [petitioners]" was obtained through wiretap orders that violated the statutory requirement. App., *infra*, 14a; *see id.* at 39a.

The suppression of such crucial evidence should not depend on the vagaries of where defendants are tried. As matters currently stand, defendants are entitled to suppression of evidence obtained through a wiretap order that exceeds the issuing court's territorial jurisdiction in the D.C. Circuit, but not in the Tenth Circuit (and likely

not in the Eleventh Circuit). In fact, with regard to facially insufficient wiretap orders more generally, only defendants in the District of Columbia are automatically entitled to suppression; defendants in most of the regional circuits must satisfy an additional test to obtain suppression. As the court of appeals recognized, however, uniformity across jurisdictions was one of the central concerns motivating Congress in enacting Title III. App., *infra*, 21a (citing S. Rep. No. 1097, 90th Cong., 2d Sess. 66 (1968)). The circuit conflict on the propriety of suppressing the fruits of facially insufficient warrants hardly reflects the nationwide consistency that Congress intended.

Not surprisingly, given the importance of wiretap evidence, law enforcement agencies heavily rely on Title III, the primary federal statute governing the use of wiretaps for criminal investigations. See, *e.g.*, Gina Stevens & Charles Doyle, Congressional Research Service, 7-5700, *Privacy: An Abbreviated Outline of Federal Statutes Governing Wiretapping and Electronic Eavesdropping* 1 (2012). In 2015 alone, law enforcement agencies obtained 4,148 wiretap orders. See United States Courts, *Wiretap Report 2015* (Dec. 31, 2015) <tinyurl.com/wiretap2015> (*Wiretap Report*). The same year, interception orders resulted in 12,923 reported arrests and 5,341 reported convictions. See *id.*, tbls. 8 & 9.

In light of the ubiquity of smartphones and the increased sophistication of wiretapping technology, moreover, the use of wiretaps is only growing: the reported number of authorized wiretap applications increased by 61% from 2001 to 2011. See Grimm 1147. Although Title III was enacted well before the advent of mobile telephones, the vast majority of wiretap orders authorized today target smartphones (whether phone calls, text messages, or other applications). See *Wiretap Report*, *supra*.

And modern technology has drastically simplified the process of wiretapping: the FBI uses a sophisticated surveillance system to intercept communications through a central network, which connects the FBI's regional "wiretapping rooms" to switches operated by major landline, cellular, and Internet companies. Christopher Doval et al., *The Communications Assistance for Law Enforcement Act: An Assessment of Policy Through Cost and Application*, 32 Temp. J. Sci. Tech. & Envtl. L. 155, 168 (2013) (internal quotation marks omitted). Given the substantial and growing use of wiretaps, there can be no serious debate that the question whether to suppress evidence obtained pursuant to a facially insufficient wiretap order will continue to arise.

2. These cases present an ideal vehicle for resolving the question presented. The question was pressed and passed upon below. The court of appeals engaged in an extensive analysis in addressing and resolving the question, which was dispositive of the suppression issue. App., *infra*, 21a-25a. And the court of appeals noted that "[m]uch of the evidence against [petitioners]" was obtained through the challenged wiretap orders, *id.* at 14a; see *id.* at 39a.

As a result of the court of appeals' opinions in these cases, moreover, the arguments on both sides of the circuit conflict have now been fully developed. In his opinion for the D.C. Circuit, Judge Silberman engaged in a similarly extensive analysis of the question presented, considering and rejecting the approach of a "number of our sister circuits" in applying the "core concerns" test to claims for suppression under Section 2518(10)(a)(ii). *Glover*, 736 F.3d at 513-516. The D.C. Circuit's opinion, together with the opinions below (and the Eleventh Circuit's opinion in

Adams, *supra*), comprehensively addresses the arguments on both sides of the conflict.

Finally, there would be little value in allowing the question presented to percolate further. Virtually all of the circuits have addressed the broader question whether suppression is a mandatory remedy for evidence obtained pursuant to a facially insufficient warrant, and those circuits continue to reapply their holdings on that question as the issue recurs. See, *e.g.*, *Cunningham*, 113 F.3d at 294; *Traitz*, 871 F.2d at 376-379; *United States* v. *Acon*, 513 F.2d 513, 516 (3d Cir. 1975); *Robertson*, 504 F.2d at 292; *United States* v. *Gray*, 521 F.3d 514, 527 (6th Cir. 2008); *Vigi*, 515 F.2d at 293; *United States* v. *Fudge*, 325 F.3d 910, 918 (7th Cir. 2003); *Lawson*, 545 F.2d at 562; *Lomeli*, 676 F.3d at 739-741; *United States* v. *Moore*, 41 F.3d 370 (8th Cir. 1994); *United States* v. *Callum*, 410 F.3d 571, 576 (9th Cir. 2005); *Swann*, 526 F.2d at 149; *Radcliff*, 331 F.3d at 1162; *United States* v. *Holden*, 603 Fed. Appx. 744, 749 (11th Cir. 2015) (per curiam), *cert. denied*, 136 S. Ct. 851 (2016); *Adams*, 788 F.2d at 1494; *United States* v. *Scurry*, 821 F.3d 1, 5 (D.C. Cir. 2016); *Glover*, 736 F.3d at 513. The question presented is therefore ripe, and indeed overdue, for the Court's review. Because these cases provide a suitable vehicle in which to resolve the circuit conflict on an important question of federal criminal law, the Court should grant the petition for certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

RICK E. BAILEY
CONLEE, SCHMIDT
& EMERSON LLP
200 West Douglas Avenue,
Suite 300
Wichita, KS 67202

Counsel for Petitioner
Los Rovell Dahda

EDWARD K. FEHLIG, JR.
FEHLIG & FEHLIG-TATUM,
LLC
3002 South Jefferson
Avenue, Suite 207
St. Louis, MO 63118

Counsel for Petitioner
Roosevelt Rico Dahda

KANNON K. SHANMUGAM
Counsel of Record
ALLISON JONES RUSHING
J. LIAT ROME
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

Counsel for Petitioner
Los Rovell Dahda

JULY 2017

APPENDIX

TABLE OF CONTENTS

Appendix A:	Court of appeals opinion in *United States* v. *Los Rovell Dahda*, April 4, 2017	1a
Appendix B:	Court of appeals opinion in *United States* v. *Roosevelt Rico Dahda*, April 4, 2017	32a
Appendix C:	District court opinion, April 16, 2014	59a
Appendix D:	Magistrate report and recommendation, April 2, 2014	66a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 15-3226

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

LOS ROVELL DAHDA,
Defendant-Appellant.

April 4, 2017

Before LUCERO and BACHARACH, Circuit Judges.*

OPINION

BACHARACH, Circuit Judge.

Mr. Los Dahda was convicted of crimes growing out of an alleged marijuana distribution network centered in

---

* The Honorable Neil Gorsuch participated in the oral argument but not in the decision. The practice of this court permits the remaining two panel judges, if in agreement, to act as a quorum in resolving the appeal. *See* 28 U.S.C. § 46(d); *see also United States v. Wiles*, 106 F.3d 1516, 1516, at n* (10th Cir. 1997) (noting that this court allows remaining panel judges to act as a quorum to resolve an appeal). In this case, the two remaining panel members are in agreement.

Kansas. The convictions resulted in a sentence of imprisonment and a fine of $16,985,250. On appeal, Los[1] presents six challenges to the convictions and sentence:

1. The evidence was insufficient to prove the conspiracy charged in count one.

2. An unconstitutional variance existed between (a) the single, large conspiracy charged in count one and (b) the trial evidence, which showed numerous smaller conspiracies.

3. The district court erred in denying a motion to suppress wiretap evidence because the wiretap authorization orders had allowed law enforcement to use stationary listening posts outside of the issuing court's territorial jurisdiction.

4. The district court failed to instruct the jury that maintenance of drug-involved premises is committed only if storing or distributing drugs constitutes a principal or primary purpose for the defendant's maintenance of the premises.

5. The district court violated the Constitution by sentencing Los to 189 months' imprisonment on count one without a jury finding on the marijuana quantity.

---

[1] Mr. Los Dahda had numerous co-defendants, including his brother Mr. Roosevelt Dahda. To avoid confusion between the two brothers, we refer to Mr. Los Dahda by his first name.

6. The district court erred in imposing a $16,985,250 fine.

We reject Los's first five challenges and agree with the sixth challenge. With these conclusions, we affirm the convictions, affirm the sentence of 189 months' imprisonment on count one, and vacate the fine of $16,985,250.

I. The Drug Distribution Network

The charges arose from a large drug-distribution operation that had been manned by over 40 individuals. These individuals obtained marijuana from California and distributed the marijuana in Kansas.

The operation began in 2006 when Mr. Chad Bauman, Mr. Peter Park, and Mr. Wayne Swift began working together to distribute marijuana in Kansas. At first, the individuals obtained their marijuana from Texas and Canada. Eventually, however, the three individuals changed sources and began obtaining their marijuana from California.

Mr. Bauman, Mr. Swift, or another member of the group would drive or fly to California, buy the marijuana, package it, store it in a California warehouse, and ship or drive the marijuana to Kansas.

Los allegedly joined the network as an importer and a dealer. In these roles, Los helped to facilitate the transactions by

- driving money from Kansas to California for someone in the group to buy the marijuana,

• assisting with the purchase and packaging of marijuana in California,

• loading marijuana into crates for shipment to Kansas, and

• selling the marijuana in Kansas to individuals who redistributed the marijuana to others.

The network operated for roughly seven years, but the relationships and work assignments varied over time. For instance, when a dispute arose, Mr. Bauman stopped working with Mr. Park and Mr. Swift. Nonetheless, Los continued to work with Mr. Bauman to acquire marijuana in California and transport the marijuana to Kansas for distribution there. About a year later, Los and Mr. Bauman stopped working together. At that point, Los resumed working with Mr. Park and Mr. Swift as the three individuals continued to acquire marijuana from California and distribute the marijuana in Kansas.

The government began investigating the drug network in 2011. As part of that investigation, the government obtained wiretap authorization orders covering telephones used by suspected members of the network. Ultimately, Los was convicted on 15 counts.

II. Sufficiency of the Evidence

Count 1 charged Los and 42 others with a conspiracy encompassing 1,000 kilograms or more of marijuana. *See* 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(vii), 846, 856; 18 U.S.C.

§ 2.[2] Los argues that the trial evidence established only a series of smaller conspiracies rather than a single conspiracy involving 1,000 kilograms or more of marijuana. We disagree.

To review sufficiency of the evidence, we engage in de novo review, considering the evidence in the light most favorable to the government to determine whether any rational jury could have found guilt beyond a reasonable doubt. *United States v. Yehling*, 456 F.3d 1236, 1240 (10th Cir. 2006). In engaging in this review, we consider all of the evidence, direct and circumstantial, along with reasonable inferences. *Id.* But we do not weigh the evidence or consider the relative credibility of witnesses. *United States v. Wells*, 843 F.3d 1251, 1253 (10th Cir. 2016).

To prove a conspiracy, the government had to show that (1) two or more persons agreed to violate the law, (2) Los knew the essential objectives of the conspiracy, (3) Los knowingly and voluntarily participated in the conspiracy, and (4) the alleged co-conspirators were interdependent. *See United States v. Wardell*, 591 F.3d 1279, 1287 (10th Cir. 2009). Determining the presence of these elements is a factual issue for the jury. *See United States v. Dickey*, 736 F.2d 571, 581 (10th Cir. 1984) ("It is essential to emphasize initially that the question whether there existed evidence sufficient to establish a single conspiracy is one of fact for the jury to decide."). This issue turns here on the existence of a common, illicit goal. *See id.* at 582.

---

[2] Count one also charged Los with a conspiracy involving cocaine. *See* 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(ii)(II), 846, 856; 18 U.S.C. § 2. But the cocaine part of the conspiracy was not submitted to the jury.

A. Sufficiency of the Evidence on a Single Conspiracy Involving 1,000 Kilograms or More of Marijuana

The trial evidence was sufficient to show the existence of a single conspiracy involving 1,000 kilograms or more of marijuana. In part, this evidence included testimony by co-defendants Park, Swift, Bauman, Alarcon, Villareal, and Mussat. Their testimony was corroborated by recorded conversations, surveillance, seizures, and business records. Together, this evidence showed that Los and others had traveled to California to purchase marijuana, joined efforts to transport the marijuana to Kansas, and coordinated the delivery of marijuana after returning to Kansas. This evidence was sufficient to show formation of a conspiracy with a common goal between all of the participants to acquire and distribute marijuana. *See United States v. Dickey*, 736 F.2d 571, 582 (10th Cir. 1984); *cf. United States v. Edwards*, 69 F.3d 419, 431 (10th Cir. 1995) (holding that unity of purpose was proven by evidence that the defendants had pooled resources to "periodically travel to Houston to purchase cocaine, and divide the cocaine among the defendants upon return to Tulsa").

Los counters that the government failed to show a single conspiracy because

- the relationships between co-defendants sometimes changed over the course of time and

- the evidence did not show interdependence among co-conspirators.

Both arguments are unavailing.

On the first argument, Los points to a turnover in personnel as the conspiracy progressed. For example, Los, Mr. Park, Mr. Swift, and Mr. Bauman intermittently stopped and resumed doing business with one another, and the suppliers and customers occasionally changed. But changes in a conspiracy's membership do not necessarily convert a single conspiracy into multiple conspiracies. *United States v. Roberts*, 14 F.3d 502, 511 (10th Cir. 1993).

"That some of the participants remained with the enterprise from its inception until it was brought to an end, and others joined or left the scheme as it went along, is of no consequence if each knew he was part of a larger ongoing conspiracy." *United States v. Brewer*, 630 F.2d 795, 800 (10th Cir. 1980). The membership changes would not prevent a reasonable jury from finding Los's unity with others in a scheme to distribute large quantities of marijuana. *See United States v. Dickey*, 736 F.2d 571, 582 (10th Cir. 1984) (numerous marijuana and cocaine transactions over a five-year period with varying participants constituted a single conspiracy).

Second, Los argues that the evidence was insufficient to show interdependence among the co-conspirators. "[I]nterdependence may be shown if a defendant's actions facilitated the endeavors of other alleged co-conspirators or facilitated the venture as a whole." *United States v. Acosta-Gallardo*, 656 F.3d 1109, 1124 (10th Cir. 2011). In our view, the government's evidence was sufficient for a finding of interdependence.

The marijuana network required various individuals to perform different tasks, including growing marijuana

in California, transporting funds to California, buying marijuana in California for distribution in Kansas, transporting the marijuana to Kansas, picking up the marijuana in Kansas, and distributing the marijuana in Kansas. *See United States v. Edwards*, 69 F.3d 419, 431-32 (10th Cir. 1995) (using similar reasoning to conclude that the government had established interdependence); *United States v. Watson*, 594 F.2d 1330, 1340 (10th Cir. 1979) ("Where large quantities of [drugs] are being distributed, each major buyer may be presumed to know that he is part of a wide-ranging venture, the success of which depends on performance by others whose identity he may not even know."). We thus conclude that the evidence established the element of interdependence.

B. Sufficiency of the Evidence on Los's Participation in the Conspiracy

The trial evidence permitted the jury to find not only a single conspiracy involving 1,000 kilograms or more of marijuana but also Los's participation in that conspiracy. For instance, the trial testimony reflected eight facts:

1. Los traveled to California to purchase marijuana from the group's suppliers. R. supp. vol. 1 at 3538, 3687, 4094-97, 4249-50, 4559-60, 5047-50.

2. Large quantities of marijuana were purchased on these trips. *Id.* at 4102, 4348, 5083.

3. Los purchased marijuana in California for transportation to Kansas. *Id.* at 4631, 4639, 4828-29.

4. Los drove money from Kansas to California to purchase marijuana and drove newly acquired

marijuana to the shipping warehouse in California. *Id.* at 3446-47, 4310, 4560-61, 5244-46.

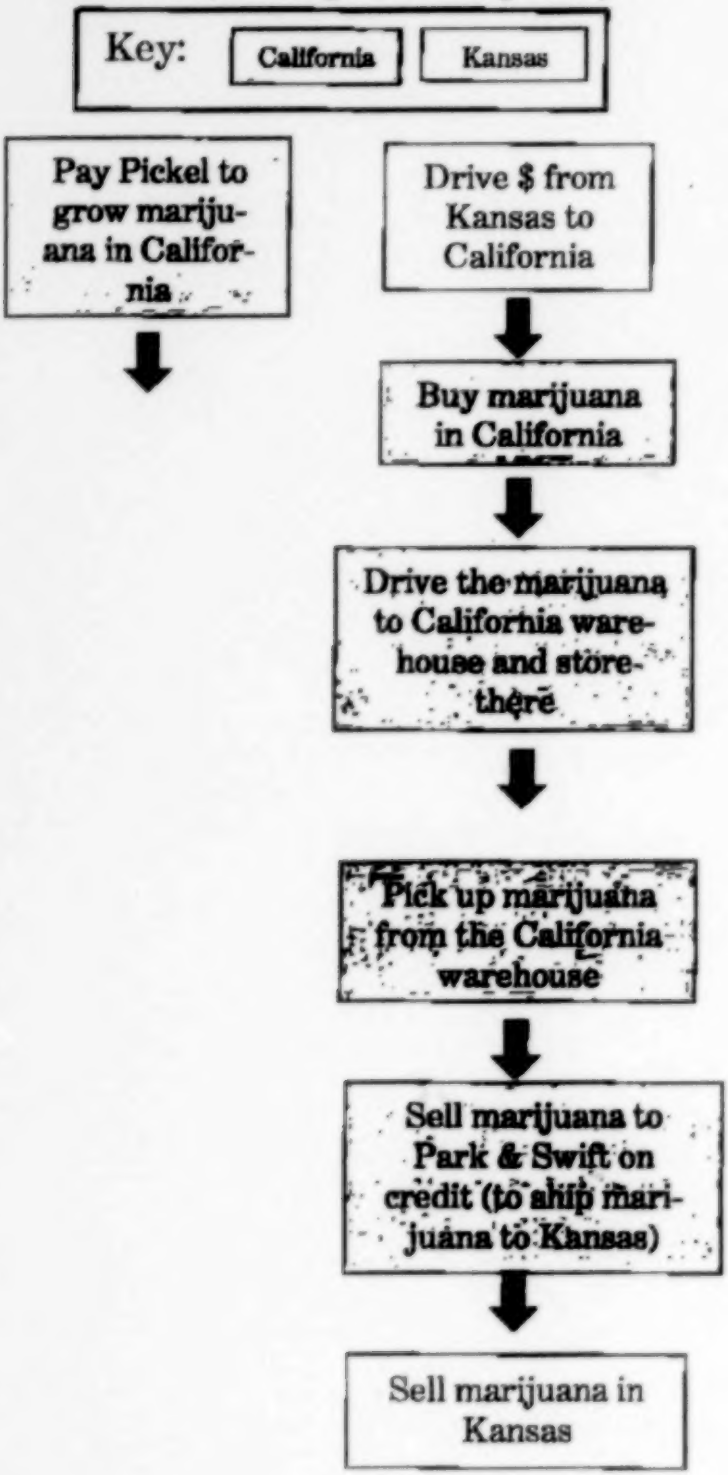
5. Los picked up marijuana that had been stored in the California warehouse. *Id.* at 3306-07, 4260-61.

6. Mr. Park and Mr. Swift helped Los by shipping marijuana from California to Kansas. In return, Los provided marijuana on credit to Mr. Park and Mr. Swift. *Id.* at 4629-30, 4640.

7. Los funded a grow operation in California that was run by a co-defendant, Mr. Justin Pickel. *Id.* at 5232-35. Co-defendants Park and Paiva helped with the grow operation. *Id.* at 5235, 5237, 5241. Approximately 200 marijuana plants were later found at Mr. Pickel's residence. *Id.* at 1960.

8. In Kansas, Los and other co-conspirators sold marijuana to dealers in Kansas for redistribution there. *Id.* at 3285, 4263, 4348.

Los's Contributions to the Global (1,000 Kg+) Conspiracy



Los counters with three arguments:

1. He did not agree to deal cocaine.

2. He did not agree to personally drive large quantities of marijuana.

3. He tried to keep his marijuana separate from the co-defendants' marijuana.

In part, Los contends that he did not share the essential objectives of the charged conspiracy because he did not know that some co-conspirators were also dealing in cocaine. This argument fails because a cocaine conspiracy was never submitted to the jury.

Though count one charged a conspiracy involving cocaine, this part of the conspiracy was not submitted to the jury. Thus, the jury had only to gauge the proof of a conspiracy involving marijuana. That proof was unaffected by the fact that some co-conspirators had also dealt in cocaine. *See United States v. Dickey*, 736 F.2d 571, 582-83 (10th Cir. 1984) (rejecting the argument that a conspiracy involving more than one drug constituted evidence of multiple conspiracies).

Los adds that he "did not want to be involved in large quantities of marijuana." Appellant's Opening Br. at 23. For this argument, Los relies on testimony that he did not want to drive hundreds of pounds of marijuana. R. supp. vol. 1 at 5170-71. But that testimony did not show that Los lacked knowledge of the scope of the marijuana network. To the contrary, the trial evidence showed that Los had known that large quantities of marijuana were being grown and purchased in California and brought to Kan-

sas. Los simply wanted someone else to drive the marijuana because of the risk that the driver would be caught; Los wanted others to bear that risk.

In analogous circumstances, we have recognized the sufficiency of evidence on a large drug conspiracy when various individuals perform assigned tasks involving the transportation and sale of illegal drugs. *See United States v. Evans*, 970 F.2d 663, 673 (10th Cir. 1992). In addition, we have upheld the sufficiency of evidence for particular defendants based on their roles and knowledge of "the nature and objectives of the criminal conspiracy." *United States v. Small*, 423 F.3d 1164, 1184 (10th Cir. 2005); *see also United States v. Vaziri*, 164 F.3d 556, 565 (10th Cir. 1999) ("Generally, it is sufficient for purposes of a single-conspiracy finding that a conspirator knowingly participated with a core conspirator in achieving a common objective with knowledge of the larger venture."). Thus, a reasonable fact-finder could infer that Los shared the conspiratorial objectives.

Finally, Los denies that he and his alleged co-conspirators were interdependent. For this argument, Los points to evidence that he selected his own marijuana and kept track of his own marijuana and money even if they were being shipped with others' marijuana or money. But the jury also heard testimony that (1) Los's marijuana was sometimes combined with marijuana purchased by others and (2) many individuals relied on Los as a supplier. R. supp. vol. 1, at 3653, 4638-39. In addition, the government presented evidence that Los had driven money to California for the group to buy marijuana, had bought the group's marijuana in Kansas, had stored the group's marijuana in a California warehouse, had picked up the group's marijuana from the Kansas warehouse, and had

paid Mr. Pickel to grow marijuana for resale in Kansas. Together, the evidence allowed a jury to reasonably find the element of interdependence.

* * *

In sum, the government presented evidence that Los and others had frequently bought and sold marijuana from one another, worked together to grow marijuana, and united to transport marijuana from California for distribution in Kansas. Viewed in the light most favorable to the government, the evidence was sufficient to establish that Los had joined the single conspiracy charged in count one. We therefore reject Los's challenge to the sufficiency of the evidence regarding a single conspiracy of 1,000 kilograms or more.[3]

III. Variance

Los argues that there was a prejudicial variance between the conduct charged in count one and the trial evidence. According to Los, the evidence established smaller conspiracies rather than a single, large conspiracy.

"In the context of a conspiracy conviction, we treat a variance claim as a challenge to the sufficiency of the evidence establishing that each defendant was a member of the same conspiracy." *United States v. Gallegos*, 784 F.3d 1356, 1362 (10th Cir. 2015). Viewing the challenge in this

---

[3] In his reply brief, Los questions the jury instructions and verdict form for count one. But in his opening brief, Los confined his challenge to the sufficiency of the evidence; there was no challenge to the jury instructions or verdict form on count one. These omissions waived the challenges to the jury instructions and verdict form. *United States v. Martinez*, 518 F.3d 763, 767 n.2 (10th Cir. 2008).

manner, we engage in de novo review. *United States v. Caldwell*, 589 F.3d 1323, 1328 (10th Cir. 2009).

For the same reasons discussed above, we reject Los's allegation of a variance between the conspiracy charged in count one and the trial evidence. Accordingly, we affirm Los's conviction on the conspiracy charged in count one.

IV. The Wiretap Authorization Orders

Much of the evidence against Los was obtained through wiretaps of cell phones used by Los and four co-conspirators. The wiretaps grew out of nine orders issued by the U.S. District Court for the District of Kansas.

Prior to trial, Los moved to suppress the intercepted communications, arguing that the wiretap orders exceeded the district court's territorial jurisdiction. We agree with Los that the wiretap orders exceeded the district court's territorial jurisdiction, but we affirm the denial of the motion to suppress because the territorial defect did not directly and substantially affect a congressional intention to limit wiretapping.

A. Standard of Review

We presume that the wiretap authorization orders were valid. *United States v. Radcliff*, 331 F.3d 1153, 1160 (10th Cir. 2003). Los incurred the burden to show otherwise. *Id.* In determining whether Los satisfied this burden, we engage in de novo review. *Id.*

B. Facial Invalidity

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 permits courts to authorize law enforcement's interception of telephone communications. 18 U.S.C. §§ 2510-20. Under Title III, a suppression remedy exists for communications that were intercepted (1) unlawfully, (2) based on a facially insufficient wiretap authorization order, or (3) not in conformity with the wiretap authorization order. 18 U.S.C. § 2518(10)(a). Relying on the second ground for suppression, Los argues that the wiretap authorization orders were facially insufficient because they authorized use of a stationary listening post outside of the district court's territorial jurisdiction. We agree.

Title III permits a judge to authorize "interception" of telephone calls. 18 U.S.C. § 2518(3). Generally, this authority is limited to interceptions taking place within the judge's "territorial jurisdiction." *Id.* But an exception exists, allowing interception outside the judge's territorial jurisdiction when a "mobile interception device" is used. *Id.* Thus, we must decide (1) whether the wiretap orders permitted interception outside the issuing court's territorial jurisdiction, and (2) if so, whether the orders limited extra-territorial interception to instances involving a mobile interception device.

On the first issue, the wiretap orders permitted interception outside of the issuing court's territorial jurisdiction. The wiretap authorization orders provided that "[p]ursuant to Title 18, United States Code § 2518(3), it is further Ordered that, in the event [the target telephone numbers] are transported outside the territorial jurisdiction of the court, interception may take place in any other

jurisdiction within the United States." R. supp. vol. 4 at 166, supp. vol. 5 at 6, 173, 270, 386, 499-500, 638, 766, 915.

The term "intercept" is broadly defined in Title III. This definition includes the use of a "device" to acquire the "contents" of any telephone call. 18 U.S.C. § 2510(4). But "[t]he statute does not specify precisely where an interception is deemed to occur." *United States v. Rodriguez*, 968 F.2d 130, 136 (2d Cir. 1992).

We addressed that issue in *United States v. Tavarez*, 40 F.3d 1136 (10th Cir. 1994). There we interpreted an Oklahoma counterpart to Title III, holding that interception occurs both where the tapped telephone is located and where the intercepted communications are first heard by law enforcement officials. *United States v. Tavarez*, 40 F.3d 1136, 1138 (10th Cir. 1994). That holding was based on the definitions in Oklahoma law for "intercept" and "aural acquisition." *Id.*

Title III's definition of "intercept" is virtually identical to Oklahoma's definition, covering the aural acquisition of the content of any oral communication through a device. 18 U.S.C. § 2510(4). *Compare* Okla. Stat. tit. 13, § 176.2(9), *with* 18 U.S.C. § 2510(4). And the two laws contain similar definitions for "aural" communication. *Compare* Okla. Stat. tit. 13, § 176.2(2) (defining "aural acquisition"), *with* 18 U.S.C. § 2510(18) (defining "aural transfer"). Both definitions would unambiguously include hearing someone's telephone call. *See Sanders v. Robert Bosch Corp.*, 38 F.3d 736, 739 (4th Cir. 1994) ("The recording of a telephone conversation alone constitutes an 'aural . . . acquisition' of that conversation."). Thus, an "interception" under Title III occurs both where the tapped telephones are located and where law enforcement officers put their listening

post. Indeed, every circuit court to address the issue has adopted a similar definition. *See United States v. Jackson*, 849 F.3d 540, 555-56 (3d Cir. 2017).

In this case, the wiretap orders authorized interception of cell phones located outside the issuing court's territorial jurisdiction, using listening posts that were also stationed outside the court's territorial jurisdiction. The orders allowed interception outside the court's territorial jurisdiction because there was no geographic restriction on the locations of either the cell phones or the listening posts. The orders therefore violated the general rule that interception must occur within the issuing court's territorial jurisdiction.

But the statutory exception allows law enforcement to listen to calls outside the issuing court's territorial jurisdiction by using a "mobile interception device." 18 U.S.C. § 2518(3). To determine whether this exception was triggered, we ask whether law enforcement used a "mobile interception device." This question turns on what a "mobile interception device" is.

Three possibilities exist:

1. A listening device that is mobile,[4]

---

[4] For example, some scholars point to small mobile devices such as "IMSI catchers," which are capable of intercepting the content from cellphone calls. Gus Hosein & Caroline Wilson Palow, *Modern Safeguards for Modern Surveillance: An Analysis of Innovations in Communications*, 74 Ohio. St. L.J. 1071, 1081 (2013); Stephanie K. Pell & Christopher Soghoian, *Your Secret Stingray's No Secret Anymore: The Vanishing Government Monopoly Over Cell Phone Surveillance & Its Impact on National Security & Consumer Privacy*, 28 Harv. J.L. & Tech. 1, 11 (2014).

2. a cell phone being intercepted, or

3. a device that intercepts mobile communications, such as cellphone calls.

Of the three possibilities, only the first one is compatible with the statute.

The statute's plain language controls unless the plain language would "produce a result demonstrably at odds with the intention of its drafters . . . ." *Starzynski v. Sequoia Forest Indus.*, 72 F.3d 816, 820 (10th Cir. 1995). In examining the meaning of "mobile interception device," we begin with the words' grammatical functions. *See* Antonin Scalia & Bryan A. Garner, *Reading Law* 140 (2012) ("Words are to be given the meaning that proper grammar and usage would assign them.").

The term "mobile" is an adjective, which functions to modify a noun. *See Webster's Third New Int'l Dict.*, 1450 (Gove ed. 1993) (defining an adjective); Bryan A. Garner, *Garner's Dict. of Legal Usage* 23 (3d ed. 2011) (defining a noun). Accordingly, the term "mobile" modifies "interception device" and "the phrase 'mobile interception device' on its face appears to refer to the mobility of the device used to intercept communications." *United States v. North*, 735 F.3d 212, 218 (5th Cir. 2013) (DeMoss, J., concurring opinion).

The second possible interpretation would be to treat the cell phones themselves as "mobile interception devices." This interpretation is impossible to square with Title III. Title III describes the term "device" as something used to intercept a call. 18 U.S.C. § 2510(5). The cell phone is the thing being intercepted, not the thing being used to

intercept the call. Thus, this interpretation is incompatible with Title III.

The third possibility treats a "mobile interception device" as something used to intercept mobile communications. This interpretation would require us to rewrite the statute, creating an entirely different use of the term "mobile."

As discussed above, the statutory term "mobile" precedes two nouns: "interception" and "device." Thus, only three possibilities exist: The term "mobile" can modify (1) "interception," (2) "device," or (3) both "interception" and "device." But the third possible interpretation would ignore all of these possibilities, using "mobile" to modify the noun "telephone." This interpretation does not make sense because the word "telephone" is not included in the phrase "mobile interception device."

This interpretation is based on the Seventh Circuit's opinion in *United States v. Ramirez*, 112 F.3d 849 (7th Cir. 1997). In *Ramirez*, the Seventh Circuit concluded that the term "mobile interception device" includes devices that intercept mobile communications, such as cell phone calls. *Ramirez*, 112 F.3d at 853 ("The term [mobile interception device] in context means a device for intercepting mobile communications . . . ."). There, however, the Seventh Circuit acknowledged that its interpretation deviated from the statutory language. *Id.* at 852. The court recognized that the statutory language, when read literally, would prevent a judge from authorizing interception of cell phone calls through a stationary listening post when both the cell phones and the listening post are located outside of the judge's district. *Id.* at 852.

The Seventh Circuit declined to adopt the literal meaning of the statute, reasoning that the emphasis on the listening post's location "makes very little sense" because "that location is fortuitous from the standpoint of the criminal investigation." *Id.* at 852. The Seventh Circuit then examined Title III's legislative history and concluded that " 'mobile interception device' was intended to carry a broader meaning than the literal one." *Id.* As the Seventh Circuit explained, Title III's legislative history states that the jurisdictional exception for mobile listening devices "applies to both a listening device installed in a vehicle and to a tap placed on a cellular or other telephone installed in a vehicle." *Id.* The Seventh Circuit concluded that (1) this discussion of "mobile interception device" was "illustrative rather than definitional" and (2) when placed in context, the term "mobile interception device" means "a device for intercepting mobile communications." *Id.* at 853.

Even if the legislative history was "illustrative rather than definitional," the illustration underscores the statute's plain language: A bug attached to a car phone is an interception device that is mobile. At a minimum, the legislative history is not demonstrably at odds with a literal interpretation of the statute. Thus, we are not at liberty to scuttle the statute's plain meaning.

Instead, we conclude that the term "mobile interception device" means a mobile device for intercepting communications. The wiretap orders authorized interception of cell phones that were outside of the court's territorial jurisdiction, to be heard with stationary listening posts that could also be positioned outside of the court's jurisdiction. Thus, the orders were facially insufficient under Title III.

C. Suppression as a Remedy

Though the wiretap orders were facially insufficient, the defect does not necessarily require suppression. *See United States v. Foy*, 641 F.3d 455, 463 (10th Cir. 2011) ("Not all deficiencies in wiretap applications . . . warrant suppression."). Rather, suppression is required only if the jurisdictional requirement is one of "those statutory requirements that directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *United States v. Giordano*, 416 U.S. 505, 527 (1974); *see United States v. Radcliff*, 331 F.3d 1153, 1162 (10th Cir. 2003) (extending this rule to suppression for facial insufficiency under 18 U.S.C. § 2518(10)(a)(ii)).

Applying this test, we conclude that suppression is not required for the district court's authorization of wiretaps beyond the court's territorial jurisdiction. *See Adams v. Lankford*, 788 F.2d 1493, 1500 (11th Cir. 1986) (holding that authorization of a wiretap order beyond the territorial restrictions in 18 U.S.C. § 2518(3) does not require suppression because the statutory violation would not implicate Congress's core concerns underlying Title III). *But see United States v. Glover*, 736 F.3d 509, 515 (D.C. Cir. 2013) (concluding that territorial jurisdiction is a core concern of Title III).

We begin with the underlying concerns that animate Title III: "(1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." S. Rep. No. 90-1097, at 66 (1968). Los does not explain how

these congressional concerns relate to the statute's territorial limitation.

Congress's goals for Title III included

- protection of the privacy of oral and wire communications and
- establishment of a uniform basis for authorizing the interception of oral and wire communications.

Id.[5] In discussing how the statute protects privacy, the legislative history provides two examples:

1. Limiting who can conduct wiretaps (only "duly authorized law enforcement officers engaged in the investigation or prevention of specified types of serious crimes") and
2. creating an evidentiary burden for a wiretap (probable cause).

Id.

Not surprisingly, the territorial limitation does not appear in the congressional examples of privacy protections in Title III. And the territorial limitation differs from these examples and was not mentioned in the legislative history. *See United States v. Chavez*, 416 U.S. 562, 578 (1974) (relying in part on the absence of legislative history concerning certain Title III provisions to conclude that a statutory violation did not warrant suppression).

---

[5] This list of Title III's goals is not exhaustive.

Nor does the territorial requirement implicate the statutory goal of uniformity. Indeed, suppression might actually undermine this goal. In Title III, Congress sought to centralize electronic surveillance decisions with a state's chief prosecuting officer. S. Rep. No. 90-1097, at 98 (1968). But the territorial limitations potentially undermine uniformity by requiring prosecutors in multiple jurisdictions to coordinate about how they use electronic surveillance. *Adams v. Lankford*, 788 F.2d 1493, 1499 (11th Cir. 1986).

Los argues that the territorial limitation thwarts forum shopping, reducing opportunities for the government to manipulate the choice of a forum to obtain warrants that may not be approved elsewhere. *See United States v. North*, 735 F.3d 212, 218-19 (5th Cir. 2013) (DeMoss, J., concurring opinion) (relying on similar reasoning). In our view, however, the territorial limitation does not prevent forum shopping.

As noted above, a judge may authorize a wiretap if (1) the target phone is within the judge's territorial jurisdiction, (2) the government's stationary listening post is located in the judge's territorial jurisdiction, or (3) the government is using an authorized mobile interception device. *See* Part IV(B), above. These statutory predicates permit forum shopping in two ways.

First, if the government wants to seek a wiretap authorization order from a particular court and neither the target phones nor a listening post are located in that court's territorial jurisdiction, the government could forum shop by using an authorized mobile interception device. *See* 18 U.S.C. § 2518(3). In that case, a judge can authorize interception anywhere in the United States simply

by allowing agents to use a mobile device to intercept cell phone calls.

Second, the government can forum shop by using a listening post in the preferred judge's district. As noted above, an interception takes place where the listening post is. *See* Part IV(B), above. And law enforcement has free rein on where to put the listening post. Here, for example, if law enforcement had wanted to obtain a wiretap order from a judge in Nebraska, law enforcement could use a listening post in Nebraska even though none of the underlying events or suspected co-conspirators bore any connection to Nebraska. *See United States v. Jackson*, 207 F.3d 910, 914 (7th Cir.), *overruled on other grounds*, 531 U.S. 953 (2000).[6]

For both reasons, the territorial limitations do not meaningfully curb the danger of forum shopping.[7]

* * *

---

[6] Los contends that Title III's territorial restriction is designed to ensure a jurisdictional nexus between the issuing court and the telephones to be tapped.

Los cites no authority for this proposition, and it is hard to reconcile with the statute. The statute requires a jurisdictional nexus to either the stationary listening post or to the telephones to be tapped, but not to both. The use of telephones outside of Kansas did not trigger the statute's territorial restriction.

[7] Los does not dispute that for each call used at trial, the agents' listening post was located in the District of Kansas. These cell phone communications were intercepted in the issuing court's territorial jurisdiction, which fell within Title III's territorial limitations. But the orders would have allowed interception of calls outside the issuing court's jurisdiction.

In sum, we hold that the facial defects in the nine wiretap authorization orders did not require suppression. Thus, the district court did not err in denying the motion to suppress.[8]

V. Jury Finding on the Marijuana Quantity

Los was found guilty on count 1, which charged a conspiracy involving 1,000 kilograms or more of marijuana. *See* 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(vii), 846, 856. For this count, Los obtained a sentence of 189 months' imprisonment. He contends that this sentence violates the Constitution because the jury did not specifically find the marijuana quantity involved in the conspiracy.

"We review the legality of an appellant's sentence de novo." *United States v. Jones*, 235 F.3d 1231, 1235 (10th Cir. 2000).

The penalties for violating § 841(a) appear in subsection (b). Subsection (b)(1)(D) provides a maximum sentence of 5 years' imprisonment if the total marijuana weight was less than 50 kilograms. 21 U.S.C. § 841 (b)(1)(D). Subsection (b)(1)(C) provides a maximum sentence of 20 years' imprisonment when no specific amount is charged. And subsections (b)(1)(A) and (B) provide higher maximum sentences depending on the type and quantity of the substance; in cases involving 1,000 kilograms or more of marijuana, subsection (b)(1)(A) imposes

---

[8] The government argues that even if the wiretap evidence should have been suppressed, any error in admitting the wiretap evidence would have been harmless because the government proved Los's guilt by overwhelming non-wiretap evidence. We need not reach this argument.

a mandatory minimum sentence of 10 years and a maximum sentence of life imprisonment. 21 U.S.C. § 841(b)(1)(A)(vii).

Although Los was found guilty of participating in a conspiracy involving 1,000 kilograms or more of marijuana, the government agreed to waive the 10-year mandatory minimum under § 841(b)(1)(A). Thus, Los was sentenced under § 841(b)(1)(C).

But he argues that he should have been subject to the 5-year maximum under § 841(b)(1)(D) because the verdict form did not require a specific determination of the marijuana quantity. We reject this argument because the marijuana quantity, 1,000 kilograms, was an element of the charged conspiracy.

Los correctly argues that to increase his maximum sentence based on drug quantity, the quantity of drugs had to be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *United States v. Jones*, 235 F.3d 1231, 1233, 1236 (10th Cir. 2000). Thus, if the jury had not found a marijuana quantity beyond a reasonable doubt, the Constitution would have limited the maximum sentence to five years under § 841(b)(1)(D). *United States v. Cernobyl*, 255 F.3d 1215, 1220 (10th Cir. 2001).

But no constitutional violation took place. On count 1, the jury found that the conspiracy had involved 1,000 kilograms or more of marijuana. Though the quantity was not addressed on the verdict form, the quantity was charged in the indictment and included in Instruction 19: "As to each defendant, to carry its burden of proof on Count 1, the government must prove beyond a reasonable doubt each of the following elements: . . . the overall scope

of the agreement involved more than 1,000 kilograms of marijuana." R. vol. 1 at 401. In turn, the verdict form directed the jury to make its findings on count 1 "[u]nder instructions 19-21." *Id.* at 433.

"We presume the jury follows its instructions" in the absence of an overwhelming probability to the contrary. *United States v. Rogers*, 556 F.3d 1130, 1141 (10th Cir. 2009); *United States v. Herron*, 432 F.3d 1127, 1135 (10th Cir. 2005). There is no reason to think that the jury disregarded its instructions, and we see no reason to reject the presumption here. Thus, we reject Los's challenge to the sentence on count one. *See United States v. Singh*, 532 F.3d 1053 (9th Cir. 2008) (holding that no *Apprendi* violation took place when the burden of proof on a fact, which enhanced the statutory maximum, was contained in a jury instruction but not in the verdict form); *United States v. O'Neel*, 362 F.3d 1310, 1314 (11th Cir. 2004) (same), *vacated sub nom., Sapp v. United States*, 543 U.S. 1107 (2005), *reinstated*, 154 Fed.Appx. 161 (11th Cir. 2005).

VI. Jury Instruction on Maintenance of Premises to Store or Distribute Marijuana

Los was convicted of maintaining premises for the purpose of storing and distributing marijuana. *See* 21 U.S.C. § 856(a)(1)-(2) and 18 U.S.C. § 2. For guilt on maintaining drug-involved premises, the defendant must have "(1) knowingly (2) opened or maintained a place (3) for the purpose of manufacturing by repackaging, distributing, or using any controlled substance." *United States v. Williams*, 923 F.2d 1397, 1403 (10th Cir. 1990).

According to Los, the jury was improperly instructed on the third element. Los contends that the jury should have been told to consider whether storing or distributing

marijuana was the *primary or principal* purpose for maintaining the premise. The government contends that Los failed to preserve this argument, and we agree.

"[W]aiver is the 'intentional relinquishment or abandonment of a known right.' " *United States v. Olano*, 507 U.S. 725, 733 (1992) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Applying this definition, we conclude that Los intentionally relinquished his challenge to the content of the jury instruction. *See United States v. Teague*, 443 F.3d 1310, 1314 (10th Cir. 2006) ("[A] party that has *forfeited* a right by failing to make a proper objection may obtain relief for plain error; but a party that has *waived* a right is not entitled to appellate relief."). This relinquishment constituted a waiver.[9]

At the charging conference, Los represented that he was not challenging the content of the jury instruction. Instead, Los argued that there was not enough evidence to justify this instruction.

As Los points out, the district court initially construed this objection as a challenge to the instruction's content. R. sup. vol. 1 at 5780. But Los immediately clarified: "*I don't want the instruction changed*, I want it omitted because we're making an allegation that there was insufficient evidence to submit it." *Id.* (emphasis added). Based on this exchange, we conclude that Los waived any challenge to the content of the jury instruction. *See United*

---

[9] The government urged forfeiture rather than waiver. But we may consider the issue of waiver sua sponte. *United States v. Mancera-Perez*, 505 F.3d 1054, 1057 n.3 (10th Cir. 2007).

States v. Carrasco-Salazar, 494 F.3d 1270, 1272-73 (10th Cir. 2007) ("[A]n abandoned objection is waived.").

We accordingly decline to consider Los's challenge to the content of the jury instruction.

VII. Fine

Finally, Los challenges the $16,985,250 fine as procedurally and substantively unreasonable. The government does not address these challenges, but concedes that the fine was erroneous because it exceeded the statutory maximum. We agree with this concession. Los was subject to a fine on 15 counts; for these counts, the maximum fine would have been $13,750,000.[10] As a result, we reverse the

---

[10] The government explained:

> As to Count One, 21 U.S.C. § 841(b)(1)(A) carries a maximum fine of $10,000,000.00 if the defendant is an individual. The maximum fine is $20,000,000 if the individual has a prior felony drug conviction, which is not applicable here. 21 U.S.C. § 841(b)(1)(A). As to Counts 26, 36, 43, 49, 73, 85, and 88, the maximum fine on each count is $250,000. 21 U.S.C. § 841(b)(1)(D). Count 31 carries a maximum fine of $500,000. 21 U.S.C. § 856(b). As to Counts 38, 39, 41, 42, 45, and 46, the maximum fine on each count is $250,000. 21 U.S.C. § 843(b); 18 U.S.C. § 3571. (*See also* Vol. 2, Doc. 2049, PSR ¶ 473.) Aggregating all of the maximum fines on each count of conviction results in a total potential maximum fine of $13,750,000.00.

Appellee's Response Br. at 57 n.24.

district court's imposition of the fine and remand for reconsideration of the amount.[11]

VIII. Disposition

We affirm Los's convictions and sentence of 189 months' imprisonment on count 1. We reverse the imposition of a fine in the amount of $16,985,250 and remand for reconsideration of the amount.

LUCERO, J., concurring.

I join the majority opinion in full. I write separately to note that 18 U.S.C. § 2518(3) is in need of congressional attention. Both the terminology and the mechanisms for intercepting calls have bypassed the quaint language of this statute.

Section 2518(3) empowers judges to authorize the interception of "electronic communications within the territorial jurisdiction of the court in which the judge is sitting." Id. Judges may also authorize interception "outside that jurisdiction but within the United States in the case of a mobile interception device." Id. The congressional discussion of this provision, which like the statute appears trapped in history, suggests that the phrase "mobile interception device" would apply "to both a listening device installed in a vehicle and to a tap placed on a cellular or other telephone instrument installed in a vehicle." S. Rep. No. 99-541, at 30 (1986), as reprinted in 1986 U.S.C.C.A.N. 3555, 3584.

---

[11] We express no opinion on Los's arguments of procedural and substantive reasonableness.

It seems that Congress intended to cover situations in which a phone being monitored under a wiretap order leaves the original jurisdiction. But in crafting language to deal with this contingency, Congress presumed that authorities would have to install a physical device to monitor calls. See id. (discussing two hypotheticals, one in which a judge "authorize[s] the installation of a device and the device will be installed within the court's jurisdiction, but the suspect will subsequently move outside that jurisdiction," and one in which "a device [is] authorized for installation in an automobile" but the vehicle is "moved to another district prior to installation"). Advances in wiretapping technology have rendered that presumption inaccurate. Mobile phone calls may now be monitored without a device located in close physical proximity to the phone.

Nevertheless, I agree with the majority opinion that we should not torture this statutory text to apply to all calls placed from a mobile phone. It is for Congress to update § 2518(3) to account for modern devices if it so chooses.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 15-3237

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

ROOSEVELT RICO DAHDA,
Defendant-Appellant.

April 4, 2017

Before LUCERO and BACHARACH, Circuit Judges.*

OPINION

BACHARACH, Circuit Judge.

---

* The Honorable Neil Gorsuch participated in oral argument, but he is not participating in the decision. The practice of this court permits the remaining two panel judges, if in agreement, to act as a quorum in deciding the appeal. *See* 28 U.S.C. § 46(d); *see also United States v. Wiles*, 106 F.3d 1516, 1516, at n* (10th Cir. 1997) (noting that this court allows remaining panel judges to act as a quorum to decide an appeal). In this case, the two remaining panel members are in agreement.

Mr. Roosevelt Dahda and 42 others faced criminal charges involving the operation of a marijuana-distribution network centered in Kansas. Roosevelt[1] was convicted on ten counts, and the district court sentenced him to 201 months' imprisonment and ordered forfeiture in the amount of $16,985,250. On appeal, Roosevelt raises seven challenges to the convictions and sentence:

1. The evidence was insufficient to prove the conspiracy charged in count one, which involved 1,000 kilograms or more of marijuana.

2. There was an unconstitutional variance between the single, large conspiracy charged in count one and the trial evidence, which showed numerous smaller conspiracies.

3. The district court erred in denying Roosevelt's motion to suppress wiretap evidence.

4. The sentence of 201 months' imprisonment exceeded the statutory maximum because the jury did not make a specific finding on the quantity of marijuana involved in the conspiracy.

5. The district court erred in setting Roosevelt's base-offense level by miscalculating the amount of marijuana attributed to Roosevelt.

6. The district court's upward variance of 33 months was substantively unreasonable.

---

[1] One of the co-defendants was Roosevelt's brother, Mr. Los Dahda. To avoid confusion, we refer to Mr. Roosevelt Dahda and Mr. Los Dahda by their first names.

7. The district court erred in entering a forfeiture judgment.

We reject the challenges in 1-4 and 6-7. But we agree with the fifth challenge, concluding that the district court miscalculated the amount of marijuana attributed to Roosevelt. Based on these conclusions, we affirm Roosevelt's convictions but remand for resentencing.

I. Sufficiency of the Evidence

Count one charged Roosevelt with a conspiracy involving 1,000 kilograms or more of marijuana. *See* 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(vii), 846, 856 (2012); 18 U.S.C. § 2.[2] Roosevelt argues that the government failed to prove that he had joined the large conspiracy charged in count one. According to Roosevelt, the evidence established only a number of smaller conspiracies.

To decide whether the evidence of guilt sufficed, we engage in de novo review, considering the evidence in the light most favorable to the government to determine whether any rational jury could have found guilt beyond a reasonable doubt. *United States v. Yehling*, 456 F.3d 1236, 1240 (10th Cir. 2006). We consider the direct and circumstantial evidence but do not balance conflicting evidence or consider the witnesses' credibility. *Id.*

To prove a conspiracy, the government must show that (1) two or more persons agreed to violate the law, (2) the defendant knew the essential objectives of the conspiracy,

---

[2] Count one also charged Roosevelt with a conspiracy involving cocaine. *See* 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(ii)(II), 846, 856; 18 U.S.C. § 2. But the cocaine component of the conspiracy was not submitted to the jury.

(3) the defendant knowingly and voluntarily participated in the conspiracy, and (4) the alleged co-conspirators were interdependent. *United States v. Wardell*, 591 F.3d 1279, 1287 (10th Cir. 2009). Determining the existence of a single conspiracy involves a question of fact for the jury. *United States v. Dickey*, 736 F.2d 571, 581 (10th Cir. 1984). This question turns on the existence of a common, illicit goal. *Id.* at 582.

Based on the trial evidence, we concluded in *United States v. Los Dahda* that the evidence was sufficient to permit the finding of a single conspiracy of 1,000 kilograms or more of marijuana.[3] 853 F.3d 1101, 1107-08 (10th Cir. 2017). Applying the same reasoning here, we reject Roosevelt's argument that the evidence established a number of smaller conspiracies rather than a single large conspiracy.

The remaining question is whether the evidence was sufficient to show that Roosevelt joined the large conspiracy involving 1,000 kilograms or more of marijuana. We conclude that the evidence was sufficient based on six categories of evidence:

1. Roosevelt drove a truck with a hidden compartment, which was used by the group to transport drugs and cash. R. vol. 1, at 406-08; R. supp. vol. 4,

---

[3] Roosevelt raises one argument not raised in Los's appeal: that Mr. Park and Mr. Swift "may have been in direct competition with [Mr. Bauman] at some points." Appellant's Opening Br. at 34. In support, Roosevelt points to Mr. Park's testimony that an individual working with Mr. Bauman might have stolen marijuana from Mr. Park's store. R. vol. 3, at 1453. This testimony is not dispositive, and Mr. Bauman and Mr. Swift testified that they had never competed with one another. R. vol. 3, at 1182, 2351. Thus, we reject Roosevelt's argument.

Exhibit 704-05. When Roosevelt drove the truck, the hidden compartment apparently contained cash. Once Roosevelt arrived in California, he was to open the compartment to remove the cash. *Id.*

2. Roosevelt relayed a request from Mr. Park for Los to travel to Northern California to inspect some marijuana grow operations. R. vol. 2, at 575; R. supp. vol. 4, Exhibit 823. In relaying this request, Roosevelt commented that he had seen some of the marijuana and that it "look[ed] very lovely." R. supp. vol. 4, Exhibit 823.

3. Roosevelt sent boxes through the group's shipping operation to Mr. Justin Pickel, who grew marijuana in California. R. vol. 1, at 474; R. supp. vol. 4, Exhibit 753. Roosevelt also agreed to send money to Mr. Pickel. R. vol. 2, at 547-48; R. supp. vol. 4, Exhibit 794.

4. Roosevelt went to the group's Kansas warehouse to pick up marijuana. R. vol. 3, at 1457-58.

5. In Kansas, Roosevelt sold pounds of marijuana that had been sent from California, R. vol. 3 at 1231-50, 1260-62, 1293-95, 1606-07, 1612; R. supp. vol. 4, Exhibits 738, 767, 772-74, 853-54.

6. The day after the police seized approximately 37 pounds of marijuana from Mr. Pickel, Roosevelt and Los discussed the fact that they had lost "half of what [they] [had] worked for" and that they had to be cautious when "bring[ing] the rest of this back." R. supp. vol. 4, Exhibit 860.

Crediting this evidence and viewing it favorably to the government, we conclude that a rational fact-finder could conclude beyond a reasonable doubt that Roosevelt knowingly and voluntarily participated in the large conspiracy. This conclusion would have remained valid even if Roosevelt had occupied a relatively minor role in the conspiracy. *See United States v. Caro*, 965 F.2d 1548, 1556 (10th Cir. 1992) ("[A] defendant's participation in the conspiracy may be slight and may be inferred from the defendant's actions so long as the evidence establishes a connection to the conspiracy beyond a reasonable doubt."). In *United States v. Anaya*, for instance, the defendant participated in a drug conspiracy only by installing hidden compartments in vehicles. 727 F.3d 1043, 1051 (10th Cir. 2013). We held that the evidence was sufficient for conviction on a conspiracy charge because the compartments had been insulated to mask smells, the defendant had seen $800,000 in cash in one of the compartments, the compartments' sizes had been measured in kilos, the defendant and his customers had communicated in code, and the defendant had been warned not to discuss the compartments. *Id.*

Similarly, Roosevelt might not have performed a major role in the conspiracy. But the trial evidence was sufficient to show that he (1) had agreed to violate the law, (2) had known that the essential objective of the conspiracy was transportation of marijuana from California to Kansas for resale in Kansas, (3) had knowingly and voluntarily participated in the conspiracy, and (4) had facilitated the conspiracy's objective.

Roosevelt counters that the government did not prove interdependence because he was unknown to several co-

conspirators and the conspiracy could have operated without him. These arguments overstate what the government had to prove. The government did not need to prove

- that Roosevelt knew or had connections with all other members of the conspiracy or

- that Roosevelt was indispensable to the conspiracy.

See United States v. Foy, 641 F.3d 455, 465 (10th Cir. 2011). "[R]ather, it is sufficient that [Roosevelt] was an operational link within [the conspiracy]." *United States v. Cornelius*, 696 F.3d 1307, 1318 (10th Cir. 2012). In light of the evidence, we conclude that the evidence sufficed for a finding that Roosevelt had at least been "an operational link" within the conspiracy. *Id.*

* * *

Viewed in the light most favorable to the government, the evidence was sufficient to establish (1) the existence of the single conspiracy charged in count one and (2) Roosevelt's participation in that conspiracy. We therefore reject Roosevelt's challenge to the sufficiency of the evidence on count one.

II. Variance

Roosevelt also urges a prejudicial variance between the conduct charged in count one and the trial evidence. According to Roosevelt, the evidence established only

smaller conspiracies rather than a single, large conspiracy.[4]

"In the context of a conspiracy conviction, we treat a variance claim as a challenge to the sufficiency of the evidence establishing that each defendant was a member of the same conspiracy." *United States v. Gallegos*, 784 F.3d 1356, 1362 (10th Cir. 2015). Viewing the challenge in this manner, we engage in de novo review. *United States v. Caldwell*, 589 F.3d 1323, 1328 (10th Cir. 2009).

Applying de novo review, we rejected the same challenge by Roosevelt's co-defendant in *United States v. Los Dahda*, 853 F.3d 1101, 1111 (10th Cir. 2017). Based on that opinion, we reject Roosevelt's assertion of a variance between count one and the trial evidence.

III. The Wiretap Authorization Orders

Much of the evidence introduced against Roosevelt was obtained through wiretaps of cell phones used by Roosevelt and four others. The wiretaps took place during the six months preceding Roosevelt's arrest and had been authorized by the U.S. District Court for the District of Kansas. Prior to trial, Roosevelt moved to suppress the

---

[4] Roosevelt made a different variance argument in district court. There, Roosevelt argued that a variance had occurred because (1) the charge involved both cocaine and marijuana and (2) the trial evidence proved only a marijuana conspiracy. The government argues that we should apply plain-error review to the new variance argument raised on appeal. Because we would affirm even under de novo review, we do not consider whether the plain-error standard applies. *See United States v. Vasquez-Alcarez*, 647 F.3d 973, 977 (10th Cir. 2011) (permitting us to assume, for the sake of argument, that an argument was not forfeited).

intercepted communications, arguing that the wiretap orders were facially insufficient because they had exceeded the district court's territorial jurisdiction.

We concluded in *United States v. Los Dahda* that suppression was not warranted even though the orders had been facially deficient. 853 F.3d 1101, 1111-16 (10th Cir. 2017). Based on our opinion in *Los Dahda*, we reject Roosevelt's challenge to the denial of his motion to suppress.

IV. Sentencing Issues

Roosevelt was sentenced to prison for a total of 201 months. In calculating the sentence, the district court determined that Roosevelt was responsible for 1,600 pounds (725.7 kilograms) of marijuana, resulting in a base-offense level of 28. *See* U.S.S.G. § 2D1.1 (2014). With adjustments and criminal history, the guideline range was 135 to 168 months. The district court then varied upward by 33 months on the ground that Roosevelt had manipulated a co-defendant into not cooperating with the government.

Roosevelt urges a remand for resentencing based on three arguments:

1. The sentence exceeded the statutory maximum because the jury did not specifically find the quantity of marijuana involved in the conspiracy.

2. The district court clearly erred in finding that Roosevelt was responsible for 1,600 pounds of marijuana.

3. The upward variance was substantively unreasonable because Roosevelt did not manipulate the co-defendant.

We reject the first and third arguments but agree with the second. Because the district court erred in attributing 1,600 pounds to Roosevelt, we remand for resentencing.

A. Jury Finding on Marijuana Quantity

As noted, Roosevelt was found guilty on count one, participation in a conspiracy involving 1,000 kilograms or more of marijuana. Roosevelt argues that the prison sentence of 201 months on count one exceeds the statutory maximum because the jury did not specifically find the quantity of marijuana involved in the conspiracy.

The penalties for violating 21 U.S.C. § 841(a) are set forth in subsection (b). The severity of the penalty turns on the quantity of drugs involved in the crime. Subsection (b)(1)(D) provides a ceiling of five years' imprisonment for less than 50 kilograms of marijuana. 21 U.S.C. § 841 (b)(1)(D). Subsection (b)(1)(C) provides a maximum sentence of 20 years' imprisonment when no specific quantity is charged. And subsections (b)(1)(A) and (B) provide even higher maximum sentences and mandatory minimums, depending on the type and quantity of the substance. In cases involving at least 1,000 kilograms or more of marijuana, subsection (b)(1)(A) imposes a mandatory minimum sentence of ten years and a maximum sentence of life imprisonment. 21 U.S.C. § 841(b)(1)(A)(vii).

Roosevelt was sentenced under subsection (b)(1)(C),[5] but he argues that he should have been sentenced under

---

[5] Although Roosevelt was found guilty of participating in a conspiracy involving 1,000 kilograms or more of marijuana, the government agreed to waive the ten-year mandatory minimum under § 841(b)(1)(A).

(b)(1)(D) because the verdict form had not included a specific finding on the marijuana quantity. But Roosevelt waived this argument in district court.

When the district court asked Roosevelt's attorney which subsection applied, the attorney responded:

> Your Honor, I would agree that (b)(1)(C) is the appropriate provision under Section 841 as regards to the defendant's sentencing range and that's because the jury did not find the quantity of drugs necessary to trigger any mandatory minimum that's based on quantity, and (b)(1)(A) and (b)(1)(B) are based on quantities. (b)(1)(C) states that for any substance under Schedule 1 or Schedule 2. It doesn't have a quantity.
>
> And I think there's case law in the Tenth Circuit that says that that provision applies in the absence of any quantity found by the jury. And so we would argue that (b)(1)(C) applies as the defendant's statutory range which has no mandatory minimum and has the maximum of 20 years.

R. vol. 3 at 2648-49.

The threshold issue is whether defense counsel's statement constitutes a waiver, which would arise if the statement had "invited" the alleged error. *United States v. Carrasco-Salazar*, 494 F.3d 1270, 1272 (10th Cir. 2007); *see also United States v. Olano*, 507 U.S. 725, 733 (1992) ("[W]aiver is the intentional relinquishment or abandonment of a known right." (citations & internal quotation marks omitted)). We conclude that defense counsel waived the present argument.

When asked which statutory provision should apply, defense counsel stated that Roosevelt should be sentenced under § 841(b)(1)(C); and the district court relied on this representation. These circumstances constitute invited error. *See United States v. Teague*, 443 F.3d 1310, 1316 (10th Cir. 2006) (rejecting the defendant's challenge to the conditions of his supervised release because he "proposed the very limitation . . . to which [he] now objects").

Roosevelt disagrees, contending that the discussion at sentencing focused on whether a statutory mandatory minimum could be imposed given the lack of a specific finding on the marijuana quantity. The issue on appeal, he explains, is whether the sentence exceeded the statutory maximum given the lack of a jury finding on quantity. We disagree, for Roosevelt expressly agreed that the statutory maximum was provided in (b)(1)(C).

But even if Roosevelt had not invited error in district court, we would reject the argument under the plain-error standard. We find plain error when (1) the ruling constitutes error, (2) the error is plain, (3) the error affects substantial rights, and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Romero*, 491 F.3d 1173, 1178 (10th Cir. 2007).

In *United States v. Los Dahda*, we addressed whether the lack of an express jury finding on quantity required resentencing of Los under 21 U.S.C. § 841(b)(1)(D), rather than § 841(b)(1)(C). 853 F.3d 1101, 1116-17 (10th Cir. 2017). Under de novo review, we concluded that the answer was "no" because the quantity of 1,000 kilograms constituted an element of the charged conspiracy. *Id.*

The same reasoning applies here. Using the same instructions and verdict form described in *Los Dahda*, the jury found Roosevelt guilty on count one, which required the jury to find that the conspiracy involved 1,000 kilograms or more of marijuana. Therefore, Roosevelt's sentence under 21 U.S.C. § 841(b)(1)(C) did not constitute error, much less plain error. *See id.*

In sum, Roosevelt waived his challenge to the statutory maximum. But even if this issue had not been waived, application of § 841(b)(1)(C) would not have constituted plain error.

B. Quantity of Marijuana Attributable to Roosevelt

Roosevelt contends that in calculating his base-offense level, the district court erroneously calculated the quantity of drugs attributable to him. The district court adopted the presentence report's recommendation, which attributed 1,600 pounds (725.7 kilograms) of marijuana to Roosevelt. This quantity involved an estimate of the weight of marijuana shipped from California to Kansas between December 2010 and May 2012.[6] During this time-period, the presentence report estimated that 20 pallets, each containing 80 pounds of marijuana, had been shipped from California to Kansas—for a total of 1,600 pounds. R. vol. 4, at 49-50. The district court determined that this estimate had been "reasonable and reliable and conservative," resulting in a base-offense level of 28. R. vol. 3, at 2668.

---

[6] These dates were selected because Roosevelt had been in prison through November 2010 and was arrested on the present charges in May 2012.

Roosevelt argues that (1) he was pinned with marijuana shipments that he could not have reasonably foreseen and (2) even if the shipments had been reasonably foreseeable, the district court clearly erred in estimating that each pallet contained 80 pounds of marijuana.[7] We reject Roosevelt's first argument but agree that the court clearly erred in estimating that each pallet contained 80 pounds of marijuana. Accordingly, we remand for resentencing.

1. Reasonable Foreseeability

A defendant is accountable for all reasonably foreseeable drug quantities that were within the scope of the jointly undertaken criminal activity. U.S.S.G. § 1B1.3 cmt. 2 (2014).

"We review the district court's factual finding concerning the quantity of drugs for which a defendant may be held accountable under a clearly erroneous standard."

---

[7] At oral argument, Roosevelt argued for the first time that the jury should have determined the quantity of marijuana used to calculate the base-offense level. But "[i]ssues raised for the first time at oral argument are considered waived." *Fed. Ins. Co. v. Tri-State Ins. Co.*, 157 F.3d 800, 805 (10th Cir. 1998).

Even if we were to consider the argument, it would fail on the merits. The jury's findings on count one resulted in a statutory maximum of 20 years' imprisonment. *See* Part IV(A), above. If the drug quantity found by the sentencing judge "did not cause [the defendant's] sentence to exceed the statutory maximum, *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000)] [would] not require that the jury make findings on quantity." *United States v. Wilson*, 244 F.3d 1208, 1215 (10th Cir. 2001). Here, the 1,600 pounds of marijuana attributed to Roosevelt did not cause his sentence to exceed the statutory maximum that would otherwise have existed. Accordingly, there was no *Apprendi* violation.

United States v. Ortiz, 993 F.2d 204, 209 (10th Cir. 1993). The finding is clearly erroneous only if it is implausible or impermissible based on the entire record. *United States v. Torres*, 53 F.3d 1129, 1144 (10th Cir. 1995). In examining the record, we must determine whether the district court could reasonably have found that the government had satisfied its burden on foreseeability by a preponderance of the evidence. *United States v. Roberts*, 14 F.3d 502, 521 (10th Cir. 1993).

Roosevelt contends that he cannot be held responsible for the first five shipments listed in the presentence report—representing 1,040 pounds of marijuana—because (1) these shipments were received by Mr. Bauman and (2) Roosevelt did not work with Mr. Bauman. As previously noted, Roosevelt's lack of a direct connection with Mr. Bauman would not preclude responsibility for the five shipments. *See* Part I, above. And the evidence showed that beginning in early 2011, Roosevelt was selling marijuana in Kansas that had been acquired in California. R. vol. 3, at 1231-50, 1260-62.

Roosevelt also argues that he was not personally linked to any of the shipments. But Roosevelt could be responsible for shipments even if he was not personally linked to them. "Section 1B1.3(a)(1)(B) makes clear that in calculating a defendant's offense level under the Guidelines, a defendant must be held accountable for the conduct of his co-conspirators, including conduct in which the defendant did not personally participate, as long as the conduct was within the scope of the jointly undertaken criminal activity and was reasonably foreseeable to the defendant." *United States v. Sells*, 541 F.3d 1227, 1235 (10th Cir. 2008).

In *United States v. Williams*, we upheld a defendant's base-offense level predicated on the entire quantity of drugs involved in the conspiracy. 897 F.2d 1034, 1041 (10th Cir. 1990). We agreed with the sentencing court that "at a minimum" the defendant "had knowledge of the criminal enterprise" and participated significantly (though only episodically). *Id.* Thus, the defendant "knew or should have known" of the total quantity of drugs involved in the conspiracy. *Id.*

Our explanation in *Williams* is also applicable here. Roosevelt was aware of the drug distribution network and participated in that network. This participation included driving cash to California for someone in the group to buy marijuana, examining a field of marijuana, picking up marijuana shipments at the group's Kansas warehouse, and selling marijuana in Kansas. *See* Part I, above. Nonetheless, the district court did not pin Roosevelt with all of the drugs involved in the conspiracy; instead, the court excluded marijuana that had been dealt while Roosevelt was in prison. Thus, the district court did not clearly err in finding that the marijuana shipments had been reasonably foreseeable and within the scope of the criminal activity undertaken by Roosevelt.

2. Estimate of Marijuana Quantity

Roosevelt also argues that the district court clearly erred in estimating that each of the 20 shipped pallets contained 80 pounds of marijuana. We agree with Roosevelt.

The government bears the burden to prove drug quantity through a preponderance of the evidence. *United States v. Ortiz*, 993 F.2d 204, 209 (10th Cir. 1993). The base-offense level may consist of an estimate if it contains some record support and is based on information bearing

"minimum indicia of reliability." *United States v. Garcia*, 994 F.2d 1499, 1508 (10th Cir. 1993); *United States v. Coleman*, 7 F.3d 1500, 1504 (10th Cir. 1993).

No such indicia of reliability are present here. The quantities in the pallets varied. For example, Mr. Bauman testified that each pallet had contained between "five or ten pounds to eighty pounds" of marijuana. R. vol. 3, at 2251. Mr. Bauman and Mr. Swift remarked that toward the end of the conspiracy, each pallet usually contained 80 pounds, with Mr. Bauman adding that there "could have been" times when the pallets contained more than 80 pounds. R. vol. 3, at 1067, 2252. But this testimony does not support a finding that the pallets contained an average of 80 pounds. In fact, the presentence report states that one of the shipments attributed to Roosevelt had contained only 33 pounds of marijuana. R. vol. 4 at 49.

The government cites no evidence showing that the district court fairly attributed 80 pounds, rather than 5-10 pounds, to the shipments used to calculate Roosevelt's base-offense level. Nor is there any way to determine what time period Mr. Bauman and Mr. Swift were referencing when they testified that toward the end of the conspiracy, the pallets usually contained 80 pounds.

In *United States v. Roberts*, we held that an estimate entailed clear error because the district court had attempted to extrapolate drug quantities from one time period to another. 14 F.3d 502, 521 (10th Cir. 1993). There one defendant admitted that he had bought and redistributed 150-200 pounds of methamphetamine between 1987 and February 1991. *Id.* at 520. The district court used this figure to estimate that the defendant was responsible for distributing 60 pounds of methamphetamine between

January 1, 1989, and February 26, 1991. *Id.* at 519-20. We rejected this estimate, concluding that the district court had "ground[ed] its conclusion in midair" because no reasonable basis existed to extrapolate the finding from the 150-200 pounds that the defendant had admitted. *Id.* at 521.

United States v. Richards is also instructive. 27 F.3d 465 (10th Cir. 1994). There a witness testified that she had bought drugs from the defendant in amounts varying from week to week, "sometimes one or two grams and sometimes four or five." *Id.* at 469. Law enforcement then used the maximum weekly quantity of five grams to estimate that the witness had purchased "80 grams, on the assumption that she [had] purchased five grams per week for sixteen weeks." *Id.* We concluded that this calculation was based on "insufficient minimally reliable evidence" because the testimony had been vague, conflicting, and unsupported by other evidence. *Id.*

Though Mr. Bauman and Mr. Swift are arguably more reliable than the witness in *Richards*, their testimony was also vague. Without a way to tie their testimony concerning the pallets of 80 pounds to the shipments attributed to Roosevelt, the testimony of Mr. Bauman and Mr. Swift was insufficient to attribute 1,600 pounds to Roosevelt.

The government argues that any error would be harmless because there was other evidence of marijuana attributable to Roosevelt. The burden falls on the government to demonstrate, by a preponderance of the evidence, that the error did not affect Roosevelt's substantial rights. *United States v. Harrison*, 743 F.3d 760, 764 (10th Cir. 2014).

The government did not satisfy this burden. The government's argument on harmlessness consists of a single sentence, referring to 37 pounds and 200 marijuana plants seized from a co-conspirator. Under the guidelines, each marijuana plant counted as 100 grams. U.S.S.G. § 2D1.1 applic. note (E). Thus, the additional evidence would account for just over 81 pounds, which was only about 5% of the marijuana weight that the district court attributed to Roosevelt. Thus, the government's reliance on additional evidence would not take the district court's finding outside the realm of speculation. In these circumstances, we remand for the district court to reassess the quantity of marijuana attributable to Roosevelt.

C. Upward Variance

Though we remand to the district court for resentencing, we address Roosevelt's argument that the upward variance of 33 months was substantively unreasonable.[8]

District courts enjoy broad discretion in sentencing, but sentences must be substantively reasonable. *United States v. Hanrahan*, 508 F.3d 962, 969 (10th Cir. 2007). Substantive reasonableness focuses on the length of the

---

[8] The district court stated that it was departing upward from the guideline range, but Roosevelt characterizes the sentence as a variance. The government refers to the sentence as both a departure and a variance and seems to use the terms interchangeably. We conclude that the court actually applied a variance rather than a departure. The district court imposed the sentence based on the 18 U.S.C. § 3553(a) factors. When a court applies the § 3553(a) factors to impose a sentence outside the guideline range, the district court is applying a variance rather than a departure. *See United States v. Alapizco-Valenzuela*, 546 F.3d 1208, 1221-22 (10th Cir. 2008).

sentence and requires that sentences be neither too long nor too short. *Id.*

We review substantive reasonableness under the abuse-of-discretion standard, which requires us to give substantial deference to the district court. *United States v. Friedman*, 554 F.3d 1301, 1307 (10th Cir. 2009). The district court abuses that discretion when rendering a decision that is arbitrary, capricious, whimsical, or manifestly unreasonable. *Id.*

Roosevelt was sentenced to 201 months' imprisonment, 33 months above the upper end of his guideline range. The district court justified the variance on the ground that Roosevelt had pressured a co-defendant, Ms. Sadie Brown, into not cooperating with the government. Because Ms. Brown did not cooperate with the government, she did not receive a "safety-valve" adjustment. *See* 18 U.S.C. § 3553(f)(5); U.S.S.G. § 5C1.2(a)(5). Without this adjustment, Ms. Brown obtained a sentence 12-33 months higher than she might otherwise have received.

Roosevelt argues that the district court lacked evidence to find manipulation of Ms. Brown. We reject this argument. The district court could reasonably rely on the evidence presented at Roosevelt's sentencing, combined with what the court had already known from Ms. Brown's sentencing. *See United States v. Spears*, 197 F.3d 465, 471 (10th Cir. 1999).[9]

---

[9] Our understanding of Ms. Brown's sentencing comes from our review of Ms. Brown's sentencing transcripts. *See* Tr. of Sentencing Volume II, *United States v. Brown*, No. 12-20083-03-KHV-3 (D. Kan. Mar. 9, 2015), ECF No. 1813; Tr. of Sentencing Volume III, *United States v. Brown*, No. 12-20083-03-KHV-3 (D. Kan. Mar. 12, 2015),

At Roosevelt's sentencing, the government produced two letters that Ms. Brown had received from Roosevelt. The first letter opens with "How is my favorite student?" and instructs Ms. Brown how to handle her criminal case. R. vol. 5, at 1. She was to try to withdraw her guilty plea, file a direct appeal based on ineffective legal assistance, and send a copy of correspondence about her case "home to [Roosevelt's mother]." *Id.* at 1. The letter adds that trying for the safety-valve adjustment now would not hurt anyone. *Id.* at 2. The second letter similarly tells Ms. Brown how to handle her sentencing and again says that her counsel provided ineffective assistance. Notably, Roosevelt sent these letters only after the end of his own criminal trial.

Upon receipt of these letters, Ms. Brown tried to qualify for the safety-valve adjustment. At her sentencing, the government contended that Ms. Brown was ineligible because she had not been truthful. Tr. of Sentencing Volume II at 30-32, *United States v. Brown*, No. 12-20083-03-KHV-3 (D. Kan. Mar. 9, 2015), ECF No. 1813. Ms. Brown testified that she had provided information to the best of her ability and that she had decided to pursue the safety-valve adjustment only after obtaining permission from Roosevelt.

The government then called the case agent who had conducted the safety-valve interview. The case agent testified that Ms. Brown had not been forthcoming during her interview, adding that "during the course of the prof-

---

ECF No. 1815. The same district judge presided over the criminal cases of both Roosevelt and Ms. Brown and relied partly on evidence from Ms. Brown's sentencing. Roosevelt does not question the district court's ability to rely on Ms. Brown's sentencing proceedings.

fer examination, there [had been] statements made relative to the Dahdas[']] manipulation of [Ms. Brown]" and that it had appeared that the Dahdas were continuing to communicate with Ms. Brown. *Id.* at 36-37. The case agent opined that during the safety-valve interview, there was discussion that the Dahdas had treated Ms. Brown "like a slave. . . ." *Id.* at 37.

After hearing this testimony, the district court continued the sentencing to give Ms. Brown a second opportunity to qualify for a safety-valve adjustment. At the continued hearing, the case agent testified that Ms. Brown had still not been completely truthful and had minimized the criminal activity of individuals related to Roosevelt. For instance, the case agent expressed the belief that Ms. Brown had minimized the involvement of co-defendant Nathan Wallace—Roosevelt's half-brother—who had yet to be sentenced. Tr. of Sentencing Volume III at 73, *United States v. Brown*, No. 12-20083-03-KHV-3 (D. Kan. Mar. 12, 2015), ECF No. 1815. Ms. Brown explained that she had not pursued the safety-valve adjustment earlier because she had not wanted to testify against Los and Roosevelt. *Id.* at 87. Ultimately, the district court determined that Ms. Brown had failed to satisfy the requirements for a safety-valve adjustment. *Id.* at 84.

At Roosevelt's sentencing, the district court found that Roosevelt was "legally and morally responsible for [the] extra time that [Ms. Brown] [was] doing" and that a sentence within the guideline range would not "adequately take into account all of the relevant conduct here." R. vol. 3, at 2685-86. These findings were not clearly erroneous. Thus, we conclude that the district court (1) acted within its discretion in varying upward and (2) imposed a substantively reasonable sentence.

V. Forfeiture

Roosevelt's final argument is that the district court erred in ordering forfeiture in the amount of $16,985,250. According to Roosevelt, the forfeiture order should be vacated for three reasons:

1. The district court violated the federal rules by failing to enter a preliminary order of forfeiture.

2. The district court lacked sufficient evidence for the amount of the forfeiture.

3. The district court failed to specify the amount of the forfeiture.

We reject these arguments.

First, Roosevelt urges vacatur of the forfeiture order because the district court failed to enter a preliminary order of forfeiture as required by Fed. R. Crim. P. 32.2(b). Roosevelt did not raise this argument in district court, and our review is limited to the plain-error standard. *United States v. Wright*, 848 F.3d 1274, 1280-81 (10th Cir. 2017). We find plain error when (1) the ruling is erroneous, (2) the error is plain, (3) the error affects substantial rights, and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Romero*, 491 F.3d 1173, 1178 (10th Cir. 2007); *see* Part IV(A) above.

Rule 32.2 provides that upon a finding that property is subject to forfeiture, the court must enter a preliminary forfeiture order "sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final. . . ." Fed. R. Crim. P.

32.2(b)(2)(A)-(B), 32.2(b)(4)(A). The court did not comply with this requirement.

The government concedes that this omission constituted an error that was plain. The resulting issue is whether the error affected Roosevelt's substantial rights and "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 732 (1993). The error affected Roosevelt's substantial rights only if the outcome was likely affected. *Romero*, 491 F.3d at 1178.

The outcome here was unaffected because Roosevelt had notice of a potential forfeiture in the amount of $16,985,250. Indeed, Roosevelt does not question the existence of notice. Nor could he do so, for he objected before the hearing to any forfeiture. R. vol. 3, at 2678-80; R. vol. 4, at 77-78.[10]

Though he was on notice of a potential forfeiture, Roosevelt argues that he was deprived of "procedures to contest the deprivation of property rights." Appellant's Reply Br. at 22 (internal quotation marks & emphasis omitted). He argues that his circumstances are analogous to those in *United States v. Shakur*, where the defendant had "timely contested six of the government's Forfeiture Allegations, but his objections were entirely ignored." 691 F.3d 979, 988 (8th Cir. 2012).

---

[10] In objecting before the hearing, Roosevelt argued that it was unclear how much of the $16,985,250 had been generated by sales of marijuana rather than cocaine. R. vol. 4, at 77. That objection was addressed to Roosevelt's satisfaction at the sentencing, and the issue became moot. R. vol. 3, at 2680.

Roosevelt does not explain how the lack of a preliminary forfeiture order deprived him of an opportunity to be heard. Nor does he argue that he would have made additional objections if a preliminary order of forfeiture had been entered. These circumstances differ from those in *Shakur*, where the defendant's pre-sentencing objections were completely ignored.

In contrast, Roosevelt's only objection was addressed to his satisfaction at the sentencing. Nor is it true here, as it was in *Shakur*, that "[t]he only mention of forfeiture came at the very end of the lengthy hearing when the district court stated, after pronouncing Shakur's sentence, 'I am going to enter a forfeiture in this case.' " *Id.* at 986. Thus, we conclude that the lack of a preliminary order of forfeiture did not affect Roosevelt's substantial rights.

In addition, Roosevelt "challenges the forfeiture judgment for the same reasons that he challenges his conspiracy conviction, namely that there was insufficient evidence of the single conspiracy, and a variance." Appellant's Opening Br. at 59. We reject this argument for the same reasons discussed above. *See* Parts I-II, above.

Roosevelt also urges vacatur on the ground that the final judgment did not state the forfeiture amount. It is true that the final judgment omitted the amount of the forfeiture. Instead, the judgment purported to make the preliminary order of forfeiture final as to Roosevelt. But as just discussed, the court never filed a preliminary order of forfeiture. As a result, the final judgment failed to incorporate the amount of the forfeiture.

It was clear from the sentencing proceeding, however, that forfeiture was ordered in the amount alleged in the superseding indictment and reported in the presentence

report, $16,985,250. R. vol. 3, at 2679-80 (addressing Roosevelt's objection to the forfeiture amount listed in the presentence report). Federal Rule of Criminal Procedure 32.2(b)(4)(B) provides that the court must (1) "include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing" and (2) "include the forfeiture order, directly or by reference, in the judgment, but the court's failure to do so may be corrected at any time under Rule 36." In turn, Rule 36 provides that "the court may at any time correct a clerical error in a judgment. . . ." Fed. R. Crim. P. 36.

Roosevelt does not dispute oral pronouncement of a forfeiture order in the amount of $16,985,250. Thus, the failure to specify the forfeiture amount in the final judgment is an error that may be corrected "at any time" under Rule 36. *See United States v. Sasser*, 974 F.2d 1544, 1561 (10th Cir. 1992) *United States v. Sasser*, 974 F.2d 1544, 1561 (10th Cir. 1992) (holding that a written judgment could be corrected to provide that the defendant's sentences would be served consecutively because the sentencing transcript revealed that the district court had intended the sentences to run consecutively); *see also United States v. Villano*, 816 F.2d 1448, 1451 (10th Cir. 1987) (en banc) ("The sentence orally pronounced from the bench is the sentence.").

In sum, the failure to state the forfeiture amount in the judgment does not warrant vacatur of the forfeiture. But we call the oversight to the attention of the district court so that it may correct the judgment.

We affirm the order of forfeiture in the amount of$16,985,250.

VI. Disposition

We affirm the convictions and forfeiture order, but remand for resentencing based on the error in calculating the amount of marijuana attributable to Roosevelt.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

No. 12-20083-02-04-05-KHV

UNITED STATES OF AMERICA, Plaintiff,

v.

LOS ROVELL DAHDA, ROSSEVELT RICO DAHDA, and JUSTIN CHERIF PICKEL, Defendants.

April 15, 2014

ORDER

VRATIL, District Judge.

On July 11, 2012, a grand jury charged defendants and others with conspiracy to possess with intent to distribute and to distribute five kilograms or more of a mixture and substance containing cocaine, a controlled substance; to possess with intent to distribute and to distribute 1,000 kilograms or more of marijuana, a controlled substance; and maintaining drug-involved premises, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(ii) and (b)(1)(A)(vii); 21 U.S.C. §§ 846, 856 and 18 U.S.C. § 2. The indictment also charged individual defendants with multiple other drug crimes.

This matter comes before the Court on *Defendant Los Dahda's Motion To Suppress The Contents Of Communications Intercepted Pursuant To Orders Insufficient On Their Face* (Doc. # 1143) filed January 2, 2014, which co-defendant Roosevelt Dahda has joined; *Defendant Los Dahda's Motion To Suppress The Contents of Unlawfully Intercepted Communications* (Doc. # 1145) filed January 2, 2014, which co-defendants Roosevelt Dahda and Justin Pickel have joined; and Justin Pickel's *Motion To Suppress Evidence* (Doc. # 1140) filed January 2, 2014, which co-defendants Los Dahda and Roosevelt Dahda have joined. The Court referred each of these motions to Magistrate Judge James P. O'Hara for a report and recommendation. On April 2, 2014, Judge O'Hara recommended that the Court overrule each of these motions. *See Report And Recommendation* (Doc. ## 1249, 1250, 1251). The deadline to file objections was April 15, 2014.

Los Dahda has timely objected to the report and recommendations regarding the motion to suppress the contents of communications (Doc. # 1143) and the motion to suppress the contents of unlawfully intercepted communications (Doc. # 1145). *See Defendant Los Dahda's Objections To The Magistrate's Reports And Recommendations* (Doc. # 1327) filed April 15, 2014. Justin Pickel has timely filed objections to the report and recommendations regarding his motion to suppress (Doc. # 1140). *See Defendant Justin C. Pickel's Objections To Report And Recommendations* (Doc. # 1328) filed April 15, 2014. For reasons set forth below the Court overrules defendants' objections, adopts the report and recommendations and overrules defendants' motions to suppress.

Legal Standards

The Court reviews de novo any part of the magistrate judge findings or recommendations to which an objection is made. *See* 28 U.S.C. § 636(b)(1); Fed. R. Crim. P. 59(b)(3). The Court may accept, reject or modify in whole or in part the findings or recommendations made by the magistrate judge. *Id.* Also, the Court may receive further evidence or return the matter to the magistrate judge with instructions. *Id.*

Analysis

I. *Defendant Justin C. Pickel's Objections* (Doc. # 1328) *To Report And Recommendation* (Doc. # 1250) *Regarding Motion To Suppress Evidence* (Doc. # 1140)

Pickel filed a motion to suppress evidence which officers seized as a result of a traffic stop in Nebraska and a search of Pickel's home in California.

Pickel asserts that the Nebraska traffic stop was illegal because he did not commit a traffic or equipment violation and the government did not prove that officers had probable cause or reasonable suspicion that he was committing a crime when they stopped him. Pickel argues that the Court must therefore suppress all evidence seized in connection with the stop. He also asserts that the search warrant for his California residence was not supported by probable cause, and thus the Court must suppress all evidence found during the search.

On March 25 and 26, 2014, Judge O'Hara held an evidentiary hearing. After considering the evidence, Judge O'Hara found that Nebraska Highway Patrol Trooper

Kurt Frazey had a reasonable articulable suspicion that Pickel's pickup had violated a Nebraska state law which requires that vehicles have adequate fenders or mud flaps. *See* Neb. Rev. Stat. § 60-6,283.[1] Judge O'Hara found that the stop was therefore objectively justified at its inception. Judge O'Hara further found that after the traffic stop ended, Pickel voluntarily consented to additional questioning, and that Trooper Frazey and another officer then developed probable cause to believe that illegal drugs were in the pickup. In the alternative, Judge O'Hara found that Trooper Frazey had probable cause to stop the pickup based on collective knowledge of law enforcement that the pickup was transporting a large amount of marijuana.

Pickel objects to the finding that Trooper Frazey had reasonable suspicion that his truck tires violated Nebraska law. Judge O'Hara conducted a visual inspection of the truck before making his ruling. Although the Court has not had that opportunity, it has reviewed pictures of the truck, see Government Exhibits 21-25, and finds that Judge O'Hara correctly determined that the tires arguably violated the Nebraska statute.

Pickel also objects to Judge O'Hara's findings that after the traffic stop ended, Pickel voluntarily consented to additional questioning which led the officers to develop probable cause to believe that illegal drugs were in the

---

[1] Neb. Rev. Stat. § 60-6,283 provides as follows:

Every new motor vehicle or semitrailer purchased after January 1, 1956, and operated on any highway in this state shall be equipped with fenders, covers, or devices, including flaps or splash aprons, unless the body of the vehicle affords adequate protection to effectively minimize the spray or splash of water or mud to the rear of the motor vehicle or semitrailer.

pickup and that Trooper Frazey had probable cause to stop the pickup based on collective knowledge of law enforcement that the pickup was transporting a large amount of marijuana. Pickel does not point to any relevant factual errors in the report and recommendations. The Court has reviewed the Judge O'Hara's thorough analysis and finds no legal error. The Court therefore overrules Pickel's objections.

II. *Defendant Los Dahda's Objections* (Doc. # 1327) *To The Magistrate's Report And Recommendation* (Doc. ## 1249, 1251) *Regarding Motions To Suppress* (Doc. ## 1145, 1143)

A. Motion To Suppress (Doc. # 1145)

Los Dahda seeks to suppress evidence of recorded telephone calls (and evidence derived from those calls) which the government intercepted pursuant to wiretap orders. Under 18 U.S.C. § 2518(10)(a)(i), Los Dahda argues that the wiretap orders were not necessary.

After an evidentiary hearing, Judge O'Hara made detailed findings of fact regarding the basis for the wiretap applications. Judge O'Hara correctly cited the legal standard for proving that a wiretap is invalid. *See* Doc. # 1249 at 19 n. 26 (citing *United States v. Foy*, 641 F.3d 455, 464 (10th Cir. 2011)). Based on the totality of the evidence, Judge O'Hara found that the wiretaps were proper and necessary.

Los Dahda objects to the finding that (1) there was probable cause to believe the wiretaps would lead to new, non-cumulative evidence, and (2) the wiretaps were legally necessary for the government to further its objec-

tives. Defendant does not point to any specific factual findings or errors of law. The Court has carefully reviewed the parties' briefs and the report and recommendation and finds that the objections should be overruled.

B. Motion To Suppress (Doc. # 1143)

Citing 18 U.S.C. § 2518(3) and 10(a)(ii), Los Dahda seeks to suppress evidence derived from the court ordered wiretaps because on their face the orders exceeded the territorial jurisdiction of the issuing court.

In his report and recommendation, Judge O'Hara thoroughly summarized the facts, defendant's argument and the pertinent case law. He concluded that although the wiretap order permitted interception outside this Court's jurisdiction, the government did not actually intercept cellular communications outside this Court's jurisdiction. Therefore, as applied, the orders did not violate the statute.

Los Dahda objects to the finding that (1) mobile phones fall within the "mobile interception device" exception to Title III territorial limitations, and (2) territorial restrictions were not one of the substantive concerns of Congress in enacting Title III. He does not, however, point to any specific factual findings or errors of law. The Court has carefully reviewed the parties' briefs and the report and recommendation and finds that the objections should be overruled.

IT IS THEREFORE ORDERED that *Defendant Los Dahda's Objections To The Magistrate's Reports And Recommendations* (Doc. # 1327) filed April 15, 2014 be and hereby are **OVERRULED.**

IT IS FURTHER ORDERED that *Defendant Justin C. Pickel's Objections To Report And Recommendations* (Doc. # 1328) filed April 15, 2014 be and hereby are **OVERRULED.**

IT IS FURTHER ORDERED that the Court hereby **adopts** the *Report And Recommendation* (Doc. # 1249) filed April 2, 2014.

IT IS FURTHER ORDERED that the Court hereby **adopts** the *Report And Recommendation* (Doc. # 1250) filed April 2, 2014.

IT IS FURTHER ORDERED that the Court hereby **adopts** the *Report And Recommendation* (Doc. # 1251) filed April 2, 2014.

IT IS FURTHER ORDERED that *Defendant Los Dahda's Motion To Suppress The Contents Of Communications Intercepted Pursuant To Orders Insufficient On Their Face* (Doc. # 1143) filed January 2, 2014, which co-defendant Roosevelt Dahda has joined be and hereby is **OVERRULED.**

IT IS FURTHER ORDERED that *Defendant Los Dahda's Motion To Suppress The Contents of Unlawfully Intercepted Communications* (Doc. # 1145) filed January 2, 2014, which codefendants Roosevelt Dahda and James Pickel have joined be and hereby is **OVERRULED.**

IT IS FURTHER ORDERED that Justin Pickel's *Motion To Suppress Evidence* (Doc. # 1140) filed January 2, 2014, which co-defendants Los Dahda and Roosevelt Dahda have joined be and hereby is **OVERRULED.**

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

No. 12-20083-01-KHV

UNITED STATES OF AMERICA, Plaintiff,

v.

LOS ROVELL DAHDA, et al., Defendants.

April 2, 2014

REPORT AND RECOMMENDATION

O'HARA, United States Magistrate Judge.

This is a drug conspiracy case. Before the court is the motion of defendant Los Rovell Dahda to suppress from evidence recorded telephone calls, and other evidence derived from those calls, that the government intercepted pursuant to wiretap orders that defendant contends were facially invalid (ECF doc. 1143).[1] The presiding U.S. District Judge, Kathryn H. Vratil, referred the motion to the undersigned U.S. Magistrate Judge, James P. O'Hara, for

---

[1] Co-defendants Roosevelt Rico Dahda and David Essman have joined in this motion.

a report and recommendation.[2] The undersigned held a hearing on the motion on March 25-26, 2014. For the reasons discussed below, the undersigned recommends the motion be denied.

During the government's investigation, the court issued, upon the government's application, nine separate orders authorizing the government to intercept communications on targeted cellular telephones ("wiretap orders"). Each wiretap order provided that "in the event [the target telephones] are transported outside the territorial jurisdiction of the court, interception may take place in any jurisdiction within the United States."[3] Defendant argues that because the wiretap orders did not explicitly require the government to maintain a listening post in Kansas when the telephones left the state, they exceeded the court's territorial jurisdiction, making them facially deficient.

Investigative wiretaps are governed by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2516 et seq. Upon application, if the court finds there is statutory cause for a wiretap, it

> may enter an ex parte order, as requested or modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within

---

[2] ECF doc. 1183.

[3] Gov. Exhs. 3, 6, 9, 12, 15, 18, 21, 24, 27 & 30.

> the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction).[4]

"Interception" occurs both at the location of the tapped telephone and at the location of the government's listening post.[5] "[A] wiretap authorization order is presumed proper, and a defendant carries the burden of overcoming this presumption."[6]

There is no dispute that the tapped telephones traveled outside of Kansas, i.e., outside the jurisdiction of this issuing court. There also is no dispute that the government monitored the communications from a listening post in Kansas, i.e., within the jurisdiction of this issuing court.[7] The only questions, then, are whether the wiretap orders were facially invalid because they *permitted* interception outside of the issuing court's jurisdiction, and, if so, whether evidence obtained under the orders *must* be suppressed even though the orders as executed did not violate the statutory provision.

---

[4] 18 U.S.C. § 2518(3).

[5] *See United States v. Tavarez*, 40 F.3d 1136, 1138 (10th Cir. 1994); *United States v. Ramirez*, 112 F.3d 849, 852 (7th Cir. 1997); *United States v. Denman*, 100 F.3d 399, 403 (5th Cir. 1996); *United States v. Rodriguez*, 968 F.2d 130, 136 (2d Cir. 1992).

[6] *United States v. Smart*, 278 F.3d 1168, 1172 (10th Cir. 2002) (quoting *United States v. Quintana*, 70 F.3d 1167, 1169 (10th Cir. 1995)).

[7] Detective Mike McAtee testified that the target telephones were monitored from a listening post in Overland Park, Kansas. There is one exception: Target Telephone 7 was monitored from a listening post in Missouri. The government has stated, however, that it will not use any of the calls derived from monitoring Target Telephone 7 in the trial of the remaining defendants. Therefore, defendant's motion is moot as to Target Telephone 7.

The government argues that the wiretap orders were not facially invalid because the language "in the event [the target telephones] are transported outside the territorial jurisdiction of the court, interception may take place in any jurisdiction within the United States" is preceded by the language "[p]ursuant to Title 18, United States Code § 2518(3)." Thus, the extra-territorial jurisdictional grant was given only to the extent permitted by the statute, i.e., "in the case of a mobile interception device." Defendant argues that the "mobile interception device" exception to the court's jurisdictional limit does not apply because cellular telephones are not "mobile interception devices."

The phrase "mobile interception device" is not defined in Title III. The Tenth Circuit has not interpreted the phrase nor addressed whether courts may authorize interception of cellular telephone calls via listening posts located outside the jurisdictional territory of the issuing court. The undersigned finds guidance, however, in the opinion of Chief Judge Richard Posner, writing for the Seventh Circuit in *United States v. Ramirez*.[8] In *Ramirez*, the court approved the exact jurisdictional language included in the wiretap orders at issue here, and concluded that § 2518(3) authorized interception of cellular phone calls via listening posts located outside the jurisdictional territory of the issuing court. The government had sought a wiretap order for the cellular telephone of a suspect who traveled between Wisconsin and Minnesota. The government obtained a wiretap order from a federal judge in Wisconsin, where the conspiracy was being investigated and would later be prosecuted. The wiretap order, like the orders at issue here, stated, "in the event that the

[8] 112 F.3d 849, 851 (7th Cir. 1997).

cellular telephone is transferred outside the territorial jurisdiction of this Court, interceptions may take place in any other jurisdiction within the United States."[9] The government set up a listening post in Minnesota and soon discovered that the user of the phone did not seem to travel outside Minnesota. The defendant moved to suppress all evidence obtained under the wiretap order.

Judge Posner recognized that under a literal reading of § 2518(3), the Wisconsin judge was not permitted to authorize the interception at a stationary listening post located outside Wisconsin calls from a cellular telephone also located outside Wisconsin.[10] Judge Posner concluded, "The literal reading makes very little sense."[11] Because cellular telephones are likely to be carried out of the issuing district given their mobility, a literal reading would mean that where, for practical investigatory reasons, the government sets up a listening post outside of the issuing jurisdiction, it would be required to obtain a wiretap order from the district court in which the listening post is located "even though that location is entirely fortuitous from the standpoint of the criminal investigation."[12] Judge Posner further concluded that "[t]he narrow, literal interpretation would serve no interest in protecting privacy, since the government can always seek an order from the district court for the district in which the listening post is located authorizing nationwide surveillance of cellular

---

[9] *Id.* at 852.

[10] *Id.*

[11] *Id.*

[12] *Id.*

phone calls. The narrow interpretation would merely complicate law enforcement."[13]

Because a literal reading of the statutory language did not make sense, Judge Posner turned to the legislative history of Title III and concluded "that 'mobile interception device' was intended to carry a broader meaning than the literal one."[14] The legislative history speaks only in terms of listening devices installed in vehicles, stating that the term applies "to both a listening device installed in a vehicle and to a tap placed on a cellular or other telephone instrument installed in a vehicle."[15] The Seventh Circuit took "this description to be illustrative rather than definitional because there is no limitation to vehicles in the statute."[16] Judge Posner than stated, "The emphasis in 'mobile interception device' falls . . . on the mobility of what is intercepted rather than on the irrelevant mobility or stationarity of the device. The term in context means a device for intercepting mobile communications, and so understood it authorized the district judge in the Western District of Wisconsin to order a tap on the phone thought to be used by [the defendant] regardless of where the phone or the listening post was."[17]

Defendant urges the court to reject *Ramirez* in favor of the concurring opinion of Judge Harold DeMoss in the

---

[13] *Id.* at 853.

[14] *Id.* at 852.

[15] S. Rep. No. 541, 99th Cong., 2d Sess. 30 (1986), U.S. Code Cong. & Admin. News 1986, pp. 3555, 3584.

[16] *Ramirez*, 112 F.3d at 852.

[17] *Id.* at 853.

Fifth Circuit case of *United States v. North*.[18] In interpreting "mobile interception device," Judge DeMoss concluded that "'[m]obile' modifies 'device,' thus the phrase 'mobile interception device' on its face appears to refer to the mobility of the device used to intercept communications, not the mobility of the tapped phone."[19] Under this reading of the statute, the "mobile interception device" exception gives a court jurisdiction to authorize interception of cellular telephone communications anywhere in the United States, so long as the government uses an interception device that is mobile rather than stable.[20]

The court finds the opinion of the Seventh Circuit in *Ramirez* more persuasive—both as a matter of precedential value and substantive reasoning—than the concurring opinion of Judge DeMoss in *North*.[21] However, even under Judge DeMoss's reasoning, the language in the wiretap orders that defendant deems offensive—i.e., "in the event [the target telephones] are transported outside the territorial jurisdictions of the court, interception may take place in any jurisdiction within the United States"—would not invalidate the orders on their face. Rather, in this situation, Judge DeMoss would look to the application of the order to ensure that the device the government used to make interceptions was mobile. In the case at bar, although the wiretap order *permitted* interception outside this court's jurisdiction, the government did not actually

---

[18] 735 F.3d 212, 215-19 (5th Cir. 2013) (DeMoss, J. concurring).

[19] *Id.* at 218.

[20] *See id.*

[21] Defendant stated during oral argument that there is no Tenth Circuit precedent that indicates which position, if either, the Tenth Circuit would adopt if presented with the question.

intercept cellular communications outside this court's jurisdiction, making the question academic.

Given the absence of caselaw supporting his position, defendant has not carried his burden of overcoming the presumption in this circuit that the wiretap authorization orders were proper. The undersigned therefore recommends that Judge Vratil conclude the wiretap orders issued in this case were not invalid on their face. In the event Judge Vratil rejects this recommendation and finds the wiretap orders facially invalid, the undersigned still recommends that the evidence obtained under the wiretap orders not be suppressed. In this case, as explained below, the undersigned finds that the language "in the event [the target telephones] are transported outside the territorial jurisdictions of the court, interception may take place in any jurisdiction within the United States" was surplusage and did not implicate Congress's core concerns in passing Title III.

Title III specifies that "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any . . . proceeding . . . if the disclosure of that information would be in violation of this chapter."[22] The statute further states that an

> aggrieved person . . . may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—

---

[22] 18 U.S.C. § 2515.

> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is *insufficient on its face;* or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.[23]

In *United States v. Radcliff,* the Tenth Circuit addressed for the first time whether evidence obtained under a facially insufficient wiretap order must be suppressed.[24] The court concluded that suppression is not required (under 18 U.S.C. § § 2518(10)(a)(i) or (ii)) "if the violated provision of Title III 'does not establish a substantive role to be played in the regulatory system.'"[25] Stated another way, "suppression is only required . . . when there is a 'failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.'"[26]

Neither the Tenth Circuit nor the District of Kansas has addressed whether the jurisdictional provision in 18 U.S.C. § 2518(3) directly and substantially implements the intent of Congress in enacting Title III. Other than the brief mention of listening devices installed on vehicles, the legislative history of the act is silent regarding Title

---

[23] *Id.* § 2518(10)(a) (emphasis added).

[24] 331 F.3d 1153, 1162 (10th Cir. 2003).

[25] *Id.* (quoting *United States v. Chavez,* 416 U.S. 562, 578 (1974)).

[26] *Id.* (quoting *United States v. Giordano,* 416 U.S. 505, 527 (1974)).

III's jurisdictional requirement. Viewing the act as a whole, the Supreme Court has recognized that the purpose of Title III "was effectively to prohibit, on the pain of criminal and civil penalties, all interceptions of oral and wire communications, except those specifically provided for in the Act, most notably those interceptions permitted to law enforcement officers when authorized by court order in connection with the investigation of the serious crimes listed in § 2516."[27] The Tenth Circuit has looked to the legislative history of the act to determine "the overall purposes of Title III":

> Virtually all concede that the use of wiretapping or electronic surveillance techniques by private unauthorized hands has little justification where communications are intercepted without the consent of one of the participants. No one quarrels with the proposition that the unauthorized use of these techniques by law enforcement agents should be prohibited. . . . Only by striking at all aspects of the problem can privacy be adequately protected.[28]

The undersigned finds that the jurisdictional provision of § 2518(3) does not directly and substantially implement the intent of Congress in enacting Title III. The undersigned reaches this conclusion based both on the silence of the legislative history regarding this provision and on the overall purposes of the act as recognized by the Supreme Court and the Tenth Circuit. The jurisdictional requirement does not implicate Congress's concerns for privacy and preventing the government's unauthorized use

---

[27] *Giordano*, 416 U.S. at 514 (footnote omitted).

[28] *Anthony v. United States*, 667 F.2d 870, 880 (10th Cir. 1981).

of surveillance techniques.[29] Accordingly, the undersigned recommends to Judge Vratil, should she reach this issue, that the evidence obtained under the wiretap orders not be suppressed.

IT IS THEREFORE RECOMMENDED that defendant's motion to suppress evidence be denied.

---

[29] *See Adams v. Lankford*, 788 F.2d 1493, 1498 (11th Cir. 1986) (holding that "core congressional concerns [under § 2518(3)] do not include the matter of" a county judge authorizing a wiretap in a neighboring county). *But see North*, 735 F.3d at 219 (DeMoss, J., concurring) ("I . . . think that the territorial jurisdiction limitation serves important substantive interests and implicates core concerns of the statute, despite the lack of legislative history."); *United States v. Glover*, 736 F.3d 509, 515 (D.C.Cir. 2013) (stating in dicta, "Even if we thought that an inquiry into the core concerns of the statute were permitted under paragraph (ii), we would, nevertheless, agree with the Fifth Circuit, which recently held that territorial jurisdiction is a core concern of Title III.").

RECORD
AND
BRIEFS.

Supreme Court, U.S.
FILED
SEP - 6 2017
OFFICE OF THE CLERK

No. 17-43

In the Supreme Court of the United States

LOS ROVELL DAHDA AND ROOSEVELT RICO DAHDA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
KENNETH A. BLANCO
Acting Assistant Attorney General
FINNUALA K. TESSIER
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Library of Congress
Law Library

QUESTION PRESENTED

Whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, required suppression of communications that were intercepted within the territorial jurisdiction of the issuing court, pursuant to a wiretap order that permitted interceptions to take place outside the jurisdiction of the issuing court.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 7
Conclusion 23

TABLE OF AUTHORITIES

Cases:

Adams v. *Lankford*, 788 F.2d 1493 (11th Cir. 1986) 11, 20
United States v. *Acon*, 513 F.2d 513 (3d Cir. 1975) 15, 18
United States v. *Chavez*, 416 U.S. 562 (1974) ..... *passim*
United States v. *Cirillo*, 499 F.2d 872 (2d Cir.), cert. denied, 419 U.S. 1056 (1974) 13
United States v. *Cunningham*, 113 F.3d 289 (1st Cir.), cert. denied, 522 U.S. 862 (1997) 13, 18
United States v. *Donovan*, 429 U.S. 413 (1977) 8, 9, 12
United States v. *Giordano*, 416 U.S. 505 (1974) ..... *passim*
United States v. *Glover*, 736 F.3d 509 (D.C. Cir. 2013) 14, 18, 19, 20
United States v. *Jackson*, 849 F.3d 540 (3d Cir. 2017) 10
United States v. *Joseph*, 519 F.2d 1068 (5th Cir. 1975), cert. denied, 424 U.S. 909 (1976), and 430 U.S. 905 (1977) 18
United States v. *Lawson*, 545 F.2d 557 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976) 13
United States v. *Lomeli*, 676 F.3d 734 (8th Cir. 2012) 13
United States v. *Moore*, 41 F.3d 370 (8th Cir. 1994) cert. denied, 514 U.S. 1121 (1995) 9, 10, 18, 21
United States v. *Nelson*, 837 F.2d 1519 (11th Cir.), cert. denied, 488 U.S. 829 (1988) 14

Cases—Continued: Page

United States v. *North*, 728 F.3d 429 (5th Cir.), withdrawn and superseded on reh'g, 735 F.3d 212 (5th Cir. 2013) 20
United States v. *Olano*, 507 U.S. 725 (1993) 22
United States v. *Radcliff*, 331 F.3d 1153 (10th Cir. 2003), cert. denied, 540 U.S. 973 (2003) 13
United States v. *Robertson*, 504 F.2d 289 (5th Cir. 1974), cert. denied, 421 U.S. 913 (1975) 13
United States v. *Scurry*, 821 F.3d 1 (D.C. Cir. 2016) 11, 14, 18, 21
United States v. *Swann*, 526 F.2d 147 (9th Cir. 1975) 13, 18
United States v. *Traitz*, 871 F.2d 368 (3d Cir.), cert. denied, 493 U.S. 821 (1989) 13, 18
United States v. *Vigi*, 515 F.2d 290 (6th Cir.), cert. denied, 423 U.S. 912 (1975) 13, 18

Constitution, statutes, and rules:

U.S. Const. Amend. IV 12
Omnibus Crime Control and Safe Streets Act of 1968, Tit. III, 18 U.S.C. 2510-2520 4
18 U.S.C. 2518(3) 4, 5, 6, 9, 10, 11
18 U.S.C. 2518(4) 11, 21
18 U.S.C. 2518(4)(a) 15
18 U.S.C. 2518(4)(b) 11
18 U.S.C. 2518(10)(a) 12, 14, 16
18 U.S.C. 2518(10)(a)(i) 12
18 U.S.C. 2518(10)(a)(ii) 4, 12, 17, 19, 20, 22
18 U.S.C. 2 2
21 U.S.C. 841(a)(1) 2, 3
21 U.S.C. 841(a)(2) 2

Statutes and rules—Continued: Page

21 U.S.C. 841(b)(1)(A) 2
21 U.S.C. 841(b)(1)(D) 2, 3
21 U.S.C. 843(b) 2
21 U.S.C. 846 ..... 2, 3
21 U.S.C. 856 2
21 U.S.C. 856(a)(1) 2
21 U.S.C. 856(a)(2) 2
21 U.S.C. 860 3
Fed. R. Crim. P.:
Rule 41(b)(2) 19
Rule 52(a) 22

Miscellaneous:

S. Rep. No. 1097, 90th Cong., 2d Sess. (1968) 10, 12, 13

In the Supreme Court of the United States

No. 17-43

LOS ROVELL DAHDA AND ROOSEVELT RICO DAHDA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in *United States* v. *Los Rovell Dahda* (Pet. App. 1a-31a), is reported at 853 F.3d 1101. The opinion of the court of appeals in *United States* v. *Roosevelt Rico Dahda* (Pet. App. 32a-58a) is reported at 852 F.3d 1282. The order of the district court (Pet. App. 59a-65a) is unreported.

JURISDICTION

The judgments of the court of appeals were entered on April 4, 2017. The petition for a writ of certiorari was filed on July 3, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Kansas, petitioner Los Dahda was convicted of conspiracy to possess with intent to

distribute and to distribute five kilograms or more of cocaine, to manufacture, to possess with intent to distribute, and to distribute 1000 kilograms or more of marijuana, and to maintain drug-involved premises, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A), 846, and 856; two counts of distribution of marijuana in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D), and 18 U.S.C. 2; maintaining a drug-involved premises, in violation of 21 U.S.C. 856(a)(1) and (2), and 18 U.S.C. 2; six counts of using a communication facility to facilitate a drug-trafficking offense, in violation of 21 U.S.C. 843(b); three counts of possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D), and 18 U.S.C. 2; and two counts of attempted possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D), 846, and 18 U.S.C. 2. D. Ct. Doc. 2076, at 1-2 (Oct. 5, 2015). He was sentenced to 189 months of imprisonment, to be followed by ten years of supervised release. *Id.* at 3-4. The court of appeals affirmed. Pet. App. 1a-31a.

Petitioner Roosevelt Dahda was convicted of conspiracy to possess with intent to distribute and to distribute five kilograms or more of cocaine, to manufacture, to possess with intent to distribute, and to distribute 1000 kilograms or more of marijuana, and to maintain drug-involved premises, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A), and 846; five counts of using a communication facility to facilitate a drug-trafficking offense, in violation of 21 U.S.C. 843(b); two counts of possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D); possession with intent to distribute and distribution of marijuana within 1000 feet of a playground, in violation of 21 U.S.C.

841(a)(1) and (b)(1)(D), and 860; and attempted possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D), and 846. D. Ct. Doc. 2192, at 1-2 (Nov. 13, 2015). He was sentenced to 201 months of imprisonment, to be followed by ten years of supervised release. *Id.* at 3-4. The court of appeals affirmed. Pet. App. 32a-58a.

1. In 2006, Chad Bauman, Peter Park, and Wayne Swift began working together to distribute marijuana in Kansas. Pet. App. 3a. Park and Swift operated a business named California Connections, Inc. and used business locations in Kansas and Hayward, California to facilitate the shipment of marijuana to Kansas inside shipping crates. 15-3236 Gov't C.A. Br. 4. At first, they obtained their marijuana from Texas and Canada. Pet. App. 3a. Eventually, however, they changed sources and began obtaining their marijuana from California. *Ibid.* The organization sent money to California via Federal Express, hidden compartments in auxiliary fuel tanks of vehicles, and crates that were shipped to California. 15-3236 Gov't C.A. Br. 4.

Petitioner Los Dahda joined the network as an importer and a dealer. Pet. App. 3a. In those roles, Los Dahda helped to facilitate the transactions by driving money for buying the marijuana from Kansas to California; assisting with the purchase and packaging of marijuana in California; loading marijuana into crates for shipment to Kansas; and selling the marijuana in Kansas to redistributors. *Id.* at 3a-4a. His twin brother, petitioner Roosevelt Dahda, assisted Los Dahda by (*inter alia*) selling marijuana in Kansas, picking up shipments of marijuana from the warehouse in Kansas,

delivering marijuana to Park, collecting narcotics proceeds, and transporting cash to California. 15-3237 Gov't C.A. Br. 5.

The network operated for approximately seven years, but the relationships and work assignments varied over time. Pet. App. 4a. For example, when a dispute arose, Bauman stopped working with Park and Swift. *Ibid.* Nonetheless, petitioner Los Dahda continued to work with Bauman to acquire marijuana in California and to transport the marijuana to Kansas for distribution there. *Ibid.* Approximately one year later, Los Dahda stopped working with Bauman and resumed working with Park and Swift to acquire marijuana from California and in Kansas. *Ibid.*

2. As part of its investigation into the drug network, the government obtained wiretap-authorization orders under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, for telephones used by suspected members of the network. After petitioners were indicted on multiple drug-trafficking counts, they moved to suppress evidence obtained from the wiretaps on the ground that (*inter alia*) "the order of authorization * * * under which it was intercepted [wa]s insufficient on its face." 18 U.S.C. 2518(10)(a)(ii); see Pet. App. 14a. Petitioners contended (as relevant) that the wiretap orders failed to comply with 18 U.S.C. 2518(3), which permits courts to issue wiretap orders "approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting," *ibid.*; see Pet. App. 67a. Petitioners did not argue that the recorded communications were in fact intercepted outside of the territorial jurisdiction of the issuing court; there was "no

dispute that the government monitored the communications from a listening post in Kansas, i.e., within the jurisdiction of this issuing court." Pet. App. 68a. Rather, petitioners argued that the wiretap orders were facially overbroad because they provided that, "[p]ursuant to [18 U.S.C. 2518(3)], * * * in the event [the target telephones] are transported outside the territorial jurisdiction of the court, interception may take place in any other jurisdiction within the United States." Pet. App. 15a-16a (citation omitted); see *id.* at 67a.

The district court referred petitioners' motion to a magistrate judge, who recommended denying it. Pet. App. 66a-76a. The magistrate explained that "[a] wiretap authorization order is presumed proper, and a defendant carries the burden of overcoming this presumption." *Id.* at 68a (citation omitted). The magistrate found that, by failing to cite any cases supporting their argument that the wiretap order was invalid, petitioners "ha[d] not carried [their] burden of overcoming th[at] presumption." *Id.* at 73a. As an additional, alternative basis for denying the motion, the magistrate determined that the complained-of language in the wiretap orders was "surplusage" and did not implicate any of "Congress's core concerns in passing Title III," and thus it did not require suppression. *Ibid.* The district court adopted the magistrate judge's report and recommendation. *Id.* at 65a.

After separate jury trials, petitioners Los Dahda and Roosevelt Dahda were convicted on 15 counts and 10 counts, and sentenced to 189 months of imprisonment and 201 months of imprisonment, respectively.

3. Petitioners each separately appealed, and the court of appeals affirmed in relevant part in both cases. Pet. App. 1a-58a. As relevant here, the court concluded

in Los Dahda's appeal that the wiretap orders were facially insufficient but that suppression of the intercepted communications was not required, *id.* at 15a-25a, and the court relied on that conclusion to reject Roosevelt Dahda's challenge to the wiretap evidence in his appeal, *id.* at 39a-40a.

As the court of appeals noted, it was undisputed that, "for each call used at trial, the agents' listening post was located in the District of Kansas," and therefore the "cell phone communications were intercepted in the issuing court's territorial jurisdiction, which fell within Title III's territorial limitations." Pet. App. 24a n.7. But the court concluded that the wiretap orders were "facially insufficient because they authorized use of a stationary listening post outside of the district court's territorial jurisdiction." *Id.* at 15a; see *id.* at 20a. The court reasoned that the orders "violated the general rule that interception must occur within the issuing court's territorial jurisdiction" "because there was no geographic restriction on the locations of either the cell phones or the listening posts." *Id.* at 17a. The court of appeals also deemed inapplicable the exception set forth in 18 U.S.C. 2518(3) that permits interception "outside [the court's] jurisdiction but within the United States in the case of a mobile interception device," *ibid.*, construing that exception to apply only where the device used to intercept communications is itself mobile. Pet. App. 17a-20a.

The court of appeals held, however, that the absence of a "geographic restriction," Pet. App. 17a, did not require suppression, see *id.* at 21a-25a. The court explained that, under this Court's precedent, "suppression is required only if the jurisdictional requirement is one of 'those statutory requirements that directly and

substantially implements the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.'" *Id.* at 21a (quoting *United States* v. *Giordano*, 416 U.S. 505, 527 (1974)) (brackets omitted).

"Applying this test," the court of appeals determined that "suppression is not required for the district court's authorization of wiretaps beyond the court's territorial jurisdiction." Pet. App. 21a. The court observed that "Congress's goals for Title III included * * * protection of the privacy of oral and wire communications and * * * establishment of a uniform basis for authorizing the interception of oral and wire communications." *Id.* at 22a. The court further observed that "the territorial limitation does not appear in the congressional examples of privacy protections in Title III," which focus on "[l]imiting who can conduct wiretaps" and "creating an evidentiary burden for a wiretap (probable cause)." *Ibid.* The court also reasoned that the territorial requirement does not "implicate the statutory goal of uniformity," and in fact it "potentially undermine[s] uniformity by requiring prosecutors in multiple jurisdictions to coordinate about how they use electronic surveillance." *Id.* at 23a. The court rejected petitioners' argument "that the territorial limitation thwarts forum shopping," explaining that, even with that limitation, the statute's design allows the government operational flexibility that affects the permissibility of a particular forum for seeking wiretap authorization. *Id.* at 23a-24a.

ARGUMENT

Petitioners contend (Pet. 17-22) that the district court erred in declining to suppress communications that were intercepted within the territorial jurisdiction

of the court that issued the wiretap orders because the orders contained overbroad language regarding the geographic scope of the interceptions they permitted. The court of appeals' decision rejecting petitioners' contention is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. This Court has made clear that "suppression is not mandated for every violation of Title III." *United States* v. *Chavez*, 416 U.S. 562, 575 (1974). "To the contrary, suppression is required only for a 'failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.'" *United States* v. *Donovan*, 429 U.S. 413, 433-434 (1977) (quoting *United States* v. *Giordano*, 416 U.S. 505, 527 (1974)).

In *Chavez*, this Court held that suppression of wiretap evidence was not required when the application and order "did not correctly identify the individual authorizing the application, as 18 U.S.C. §§ 2518(1)(a) and (4)(d) require," because an appropriate official—the Attorney General—had in fact authorized the application. 416 U.S. at 570; see *id.* at 571-573. *Chavez* contrasted its holding with the Court's decision the same day in *Giordano*, which concluded that wiretap evidence had to be suppressed when the application was, "in fact, not authorized by one of the statutorily designated officials." 416 U.S. at 508; see *Chavez*, 416 U.S. at 571. Although Title III's requirement that wiretap applications be authorized only by certain officials "responsive to the political process" was a "critical precondition" to any judicial order, *Giordano*, 416 U.S. at 516, 520, Title III's requirements that the

authorizing official be *identified* in the wiretap application and order merely serve a "reporting function" and were not intended, "by themselves, to occupy a central, or even functional, role in guarding against unwarranted use" of wiretaps, *Chavez*, 416 U.S. at 578-579. Applying the same principle, the Court subsequently held in *Donovan* that a violation of two Title III requirements—that a wiretap application identify "all those likely to be overheard," and that the government inform the court "of all identifiable persons whose conversations were intercepted"—likewise did not warrant suppression. 429 U.S. at 435, 438; see *id.* at 434-439.

Assuming arguendo that the wiretap orders here were "facially insufficient under Title III," as the court of appeals held, Pet. App. 20a; but see pp. 21-22, *infra*, the Court's decisions in *Chavez*, *Giordano*, and *Donovan* support the court of appeals' holding that suppression was not warranted. The Court's reasoning in those cases indicates that incorrect language in a wiretap order does not warrant suppression of evidence that was nonetheless lawfully intercepted where the incorrect language does not implicate a Title III requirement that plays a "substantive role * * * in the regulatory system." *Chavez*, 416 U.S. at 578; see, *e.g.*, *United States* v. *Moore*, 41 F.3d 370, 374 (8th Cir. 1994) ("Every circuit to consider the question" as of 1994 "ha[d] held that [Section] 2518(10)(a)(ii) does not require suppression if the facial insufficiency of the wiretap order is no more than a technical defect."), cert. denied, 514 U.S. 1121 (1995).

There is no dispute that all of the intercepted communications used at trial here were first heard at a listening post in Kansas, and thus were properly "intercepted" within the territorial jurisdiction of the issuing court. 18 U.S.C. 2518(3); see Pet. App. 24a n.7, 68a; see

also *United States* v. *Jackson*, 849 F.3d 540, 551 (3d Cir. 2017) ("We join the other courts of appeals that have addressed this issue in adopting the 'listening post' theory that under Title III either the interception of or the communications themselves must have been within the judge's territorial jurisdiction."). The critical question is therefore whether a wiretap order's incorrect language about its proper geographic scope violates a Title III requirement that "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures" to the circumstances that most warrant them. *Chavez*, 416 U.S. at 575, 578-579 (citation and internal quotation marks omitted). It does not.

The wiretap orders' inaccurate language regarding the geographic area in which interception could have occurred—where the communications sought to be suppressed were actually intercepted only within the court's territorial jurisdiction—is at most a "technical defect" that does not require suppression. *Moore*, 41 F.3d at 376. Although Title III generally limits the reach of a wiretap order to the issuing court's territorial jurisdiction, 18 U.S.C. 2518(3), that limitation does not play a "substantive role * * * in the regulatory system," *Chavez*, 416 U.S. at 578. As the court of appeals explained, confining the area in which interception may occur pursuant to an otherwise-valid wiretap order does not enhance the "protection of the privacy of oral and wire communications" or assist in the "establishment of a uniform basis for authorizing the interception of oral and wire communications." Pet. App. 22a (citing S. Rep. No. 1097, 90th Cong., 2d Sess. 66 (1968) (Senate Report)); see *id.* at 21a-22a. If anything, the court explained, "the territoriality limitations potentially undermine uniformity": to the extent they could require wiretap

orders to be obtained in multiple jurisdictions in the same investigation, those limitations may "requir[e] prosecutors in multiple jurisdictions" that may have different practices "to coordinate about how they use electronic surveillance." *Id.* at 23a (citing *Adams* v. *Lankford*, 788 F.2d 1493, 1499 (11th Cir. 1986)). Nor does Section 2518(3)'s territorial limitation directly protect privacy or substantively affect which communications may be intercepted. Moreover, the government may seek a wiretap order in a district in which it has a listening post (as it did here). *Id.* at 23a-24a.

In any event, regardless of whether Section 2518(3)'s territorial limitation on the district court's authority to authorize wiretaps directly and substantially implements core features of Title III, incorrect language in a wiretap order about its geographic scope does not do so. Title III does not require that a wiretap order explicitly set forth its territorial limitations. Section 2518(4) "enumerates certain categories of information that a wiretap order 'shall specify.'" *United States* v. *Scurry*, 821 F.3d 1, 8 (D.C. Cir. 2016). The location of the listening post is not part of the required information. In particular, Section 2518(4)(b)'s requirement of information about "the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted" requires only identification of the telephone (or the telephone number, or other specific facility or location) to be tapped, not the location where interceptions will occur, such as where law-enforcement agents will listen to the communications. *Id.* at 14 (citation and emphasis omitted). The requirement that applications and orders specify the "nature and location" of the "facilities" to be tapped, 18 U.S.C. 2518(4)(b), "reflects the constitutional command of particularization" enshrined

in the Fourth Amendment, Senate Report 101; see also *id.* at 102-103, which, "[i]n the wiretap context," is "satisfied by identification of the telephone line to be tapped and the particular conversations to be seized," *Donovan*, 429 U.S. at 427 n.15.

Given that Title III does not require a wiretap order to specify its territorial reach at all, the fact that an order contains incorrect language about its territorial scope does not implicate a core concern of the statute. Such language thus cannot justify suppression of communications that were in fact intercepted within the court's territorial jurisdiction.

2. a. Petitioners' counterarguments lack merit. Petitioners principally assert that the "core concerns" approach that this Court applied in *Chavez*, *Giordano*, and *Donovan* to claims that communications were "unlawfully intercepted" under 18 U.S.C. 2518(10)(a)(i) should not apply to petitioners' allegations that the wiretap orders were "insufficient on [their] face" under 18 U.S.C. 2518(10)(a)(ii). Pet. 18 (citation omitted); see Pet. 18-22. They argue (Pet. 13) that, unlike subparagraph (i), subparagraph (ii) establishes "a mechanical test"—*i.e.*, "either the warrant is facially insufficient or it is not"—and if it is facially insufficient, suppression is automatically required. That is incorrect.

Section 2518(10)(a) permits "[a]ny aggrieved person" to "move to suppress" intercepted communications on the grounds that the "(i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval." 18 U.S.C. 2518(10)(a). Contrary to petitioners' contention (Pet. 20), Section 2518(10)(a) does not automatically

require suppression whenever a court finds some defect, however technical or minor, in a wiretap order.

Taking account of Title III's purposes, this Court has held that subparagraph (i)'s "unlawfully intercepted" prong "was not intended to reach every failure to follow statutory procedures," but only violations of provisions that "directly and substantially implement" the statutory scheme. *Chavez*, 416 U.S. at 575 (citing *Giordano*, 416 U.S. at 527); see Senate Report 96 (Congress had "no intention * * * generally to press the scope of the suppression [rule] beyond present search and seizure law."). The same approach applies equally in construing subparagraph (ii)'s "insufficient on its face" prong. Even before *Giordano*, the Second Circuit denied suppression under Title III because an error in a wiretap order—"omission of a minimization directive"—"was a 'technical defect.'" *United States* v. *Cirillo*, 499 F.2d 872, 880 (2d Cir.), cert. denied, 419 U.S. 1056 (1974). Since then, every court of appeals that has directly addressed the issue has recognized that not every error in a wiretap order's language that might render it facially insufficient under subparagraph (ii) necessarily requires suppression. See Pet. 15-16 (citing *United States* v. *Cunningham*, 113 F.3d 289, 293-294 (1st Cir.), cert. denied, 522 U.S. 862 (1997); *United States* v. *Traitz*, 871 F.2d 368, 379 (3d Cir.), cert. denied, 493 U.S. 821 (1989); *United States* v. *Robertson*, 504 F.2d 289, 292 (5th Cir. 1974), cert. denied, 421 U.S. 913 (1975); *United States* v. *Vigi*, 515 F.2d 290, 293 (6th Cir.), cert. denied 423 U.S. 912 (1975); *United States* v. *Lawson*, 545 F.2d 557, 562 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976); *United States* v. *Lomeli*, 676 F.3d 734, 739 (8th Cir. 2012); *United States* v. *Swann*, 526 F.2d 147, 149 (9th Cir. 1975) (per curiam); *United States* v. *Radcliff*,

331 F.3d 1153, 1162 (10th Cir.), cert. denied, 540 U.S. 973 (2003); *United States* v. *Nelson*, 837 F.2d 1519, 1527 (11th Cir.), cert. denied, 488 U.S. 829 (1988)); see also *Scurry*, 821 F.3d at 12 (noting that the D.C. Circuit has "left open the possibility" that a "technical defect" in a wiretap order might not require suppression (citing *United States* v. *Glover*, 736 F.3d 509, 515 (D.C. Cir. 2013))).

Petitioners contend (Pet. 19-20) that the reasons underlying the Court's interpretation of subparagraph (i) as not mandating suppression for every Title III violation do not apply to subparagraph (ii). In arriving at that interpretation, the Court relied in part on "the scheme of [Section 2518(10)(a)]," explaining that interpreting subparagraph (i) "to reach every failure to follow statutory procedures" would cause subparagraphs (ii) and (iii) to "be drained of meaning." *Chavez*, 416 U.S. at 575 (citing *Giordano*, 416 U.S. at 527). Petitioners argue (Pet. 19-20) that applying the same "core concerns" construction of subparagraph (i) to subparagraph (ii) is not necessary to avoid rendering other language surplusage, and that in fact it would create superfluity "because anything that gives rise to suppression under paragraph (ii) necessarily also does so under paragraph (i)." Petitioners are mistaken.

Interpreting subparagraph (ii), *in pari materia* with subparagraph (i), not to require suppression for every facial defect follows from "the scheme of the section." *Chavez*, 416 U.S. at 575. Given this Court's holdings that suppression is not automatic under subparagraph (i) even where communications are *actually* intercepted unlawfully, it is unlikely that Congress intended to make suppression mandatory under subparagraph (ii) whenever a wiretap order is deficient in any respect,

even though the interception is otherwise conducted lawfully. It would make little sense for Congress to require suppression invariably for insubstantial errors in authorizing documents that do not affect the conduct of surveillance while not doing so for errors that result in interception that in fact transgresses Title III.

Nor does interpreting both subparagraphs (i) and (ii) in parallel to limit suppression to violations of certain fundamental Title III requirements render subparagraph (i) redundant, as petitioners assert. Subparagraph (i) applies where communications were actually intercepted in violation of Title III's core requirements. By contrast, subparagraph (ii) applies where the wiretap order itself is deficient. Each provision might warrant suppression in circumstances where the other would not. If, for example, the wiretap application is not in fact authorized by an appropriate Executive Branch official, suppression is warranted under subparagraph (i) even if the wiretap order itself is facially sufficient for purposes of subparagraph (ii). See *Giordano*, 416 U.S. at 512-529. Conversely, if "the identity of the person * * * whose communications are to be intercepted" were "known," 18 U.S.C. 2518(4)(a), but not included in the wiretap order, a court might conclude that suppression is warranted under subparagraph (ii) even if the interception complied with the terms of the order and was not "unlawful[]" under subparagraph (i). In short, the fact that subparagraph (ii) may reach some violations that subparagraph (i) does not encompass does not require a finding "that suppression is required for every minor facial insufficiency." *United States* v. *Acon*, 513 F.2d 513, 517 (3d Cir. 1975).

b. Petitioners alternatively argue (Pet. 21) that, even if subparagraph (ii) requires suppression only for defects

that go to the "'core concerns' of the statute," Title III's territorial-jurisdiction limitation implicates those concerns. See Pet. 20-22. That argument misapprehends the type of defect at issue. It is undisputed that the territorial-jurisdiction limitation *itself* was not violated here. See Pet. App. 24a n.7, 68a. The relevant question, therefore, is whether the wiretap orders' *inaccurate language* regarding their territorial reach implicates core concerns. Petitioners do not identify any Title III requirement that a wiretap order specify its territorial limits. Nor do they explain how such a requirement would serve any core purpose of the statute.

In any event, petitioners fail to show that Title III's territorial-jurisdiction limitation itself "directly and substantially implements the congressional intention to limit the use of intercept procedures." *Chavez*, 416 U.S. at 575 (citation omitted). They do not dispute the court of appeals' conclusions that territorial limits do not protect privacy and do not establish a uniform basis for the interception of communications. Cf. Pet. App. 21a-23a. Petitioners instead fault the court of appeals (Pet. 21) for consulting legislative history to identify those as core Title III concerns. But the court of appeals properly followed the course charted by this Court's decisions, which have relied in part on the legislative record in construing Section 2518(10)(a) and ascertaining Title III's fundamental aims. See, *e.g.*, *Chavez*, 516 U.S. at 578-579; *Giordano*, 416 U.S. at 516-523, 526-529.

Petitioners assert (Pet. 22) that the territorial-jurisdiction restriction "limits forum shopping by prosecutors." But petitioners offer no evidence, from the legislative history or otherwise, that preventing forum shopping was among Congress's core concerns. And as the court of appeals explained, the territorial limitation in

some cases does not significantly restrict the government's choice of forum: the government may seek approval in whatever jurisdiction it chooses to establish its listening post, or, in narrow circumstances, it may seek approval in one jurisdiction for the use of a mobile interception device nationwide. Pet. App. 23a-24a. Petitioners discount these procedures, asserting (Pet. 22) that each will often be impractical. But even crediting their contentions, the fact that Title III permits these alternatives undermines petitioners' contention that the territorial-jurisdiction limitation implements a fundamental purpose of narrowing the government's flexibility with respect to a judicial forum. Nor does the general legal principle that "courts may act only within their jurisdictions," Pet. 21, justify the specific statutory remedy of suppressing probative wiretap evidence that was obtained in a manner that did not in fact exceed the authorizing court's jurisdiction.

3. Petitioners err in asserting (Pet. 11-17) that the decision below implicates a disagreement among the courts of appeals.

a. Petitioners argue (Pet. 15-16) that the decision below adds to existing disagreement about whether Section 2518(10)(a)(ii) requires suppression for every deficiency on the face of a wiretap order. That is incorrect. As discussed above, every circuit to address the issue has acknowledged that not every defect in a wiretap order that might render it facially insufficient necessarily requires suppression. See pp. 13-14, *supra*. Although the courts of appeals have used different language in describing the types of insufficiencies that do not warrant suppression, and some have reached different conclusions regarding certain specific defects, they are in general agreement that some defects do not require

suppressing communications that are otherwise lawfully intercepted. See, *e.g.*, *Traitz*, 871 F.2d at 379 (employing "[a] two tiered analysis," asking first if order is facially insufficient and second whether that insufficiency warrants suppression); *Moore*, 41 F.3d at 375 ("[W]e accept the district court's conclusion that the order is 'insufficient on its face' and turn to the second part of the *Traitz* two-tiered analysis, whether that defect requires suppression of the resulting wiretap evidence."); *Cunningham*, 113 F.3d at 294 (denying suppressing because "the flaw in this case, although serious, was a discrete set of clerical mistakes in a process that in all other important respects complied with the statute"); *Swann*, 526 F.2d at 149 (denying suppression for a "minor facial insufficiency"); *Vigi*, 515 F.2d at 293 (same); *Acon*, 513 F.2d at 517-519 (same); cf. *United States* v. *Joseph*, 519 F.2d 1068, 1070 (5th Cir. 1975) ("[T]his particular defect did not make an order facially insufficient."), cert. denied, 424 U.S. 909 (1976), and 430 U.S. 905 (1977).

Petitioners cite (Pet. 13-14) a single decision, the D.C. Circuit's ruling in *Glover*, *supra*, that they argue rejected the view that suppression is not required for every facially insufficient wiretap order. *Glover*, however, does not squarely conflict with this well-established consensus. As the D.C. Circuit subsequently explained in *Scurry*, its decision in *Glover* "left open the possibility" that a "technical defect" in a wiretap order might not require suppression. 821 F.3d at 12 (citing *Glover*, 736 F.3d at 515). Accordingly, the D.C. Circuit would not necessarily require suppression automatically for every deficiency on the face of a wiretap order.

b. Petitioners also assert (Pet. 16-17) that the decision below conflicts with the D.C. Circuit's specific holding in *Glover* addressing Title III's territorial-jurisdiction limitation. That is similarly incorrect.

The D.C. Circuit in *Glover* considered whether to suppress communications intercepted using a mobile interception device that was installed outside the issuing court's jurisdiction. The government had sought and obtained permission from a court in the District of Columbia to place a mobile interception device on the defendant's truck, even though the application in support of the wiretap order "made [] plain" that the defendant's truck was located in another jurisdiction (Maryland). 736 F.3d at 510. The D.C. Circuit held that evidence obtained from the wiretap had to be suppressed under Section 2518(10)(a)(ii) and Federal Rule of Criminal Procedure 41(b)(2). See 736 F.3d at 515. The court reserved judgment on whether a "technical defect" would necessitate suppression, holding instead that suppression was warranted based on what it described as a "blatant disregard of a district judge's jurisdictional limitation" that could not "be regarded as only 'technical.'" *Ibid.*

There is no conflict between the result in this case and the result in *Glover*. The D.C. Circuit had no occasion in *Glover* to decide whether suppression would be required based on the type of facial insufficiency the court of appeals found here—overbroad language in a wiretap order concerning the permissible location of interception that did not result in any violation of Title III's territorial limitation. Nor did it consider whether such surplus language would be a "technical defect," 736 F.3d at 515, that would not by itself require sup-

pression. Unlike in *Glover*, in which the wiretap application "made [] plain" that the government intended to execute the wiretap order outside the issuing court's jurisdiction, *id.* at 510, nothing in the wiretap applications in this case indicated that the government sought or intended to intercept calls outside of Kansas, the issuing court's jurisdiction. Moreover, whereas the government in *Glover* executed the wiretap order in another jurisdiction by installing a mobile interception device in that jurisdiction, in this case the government intercepted all communications at a listening post in Kansas. Pet. App. 24a n.7, 68a.

Petitioners suggest (Pet. 16-17) that *Glover* conflicts with the Eleventh Circuit's decision in *Adams* v. *Lankford*, *supra*, but that asserted conflict does not warrant review in this case. *Adams* upheld the denial of habeas corpus relief based on the contention that communications were unlawfully intercepted in one state-court judicial district pursuant to a wiretap order issued by a court in another district. See 788 F.2d at 1495-1500. The Eleventh Circuit concluded that the challenge was "not cognizable on federal habeas corpus review" because the statutory structure and legislative history of Title III showed that "Congress did not consider the violations" of the statute's territorial-jurisdiction limitation alleged "to be matters of core concern." *Id.* at 1499-1500. As petitioners note (Pet. 14), the D.C. Circuit stated in *Glover* that, if "an inquiry into the core concerns of the statute were permitted under" 18 U.S.C. 2518(10)(a)(ii), the court would conclude that "territorial jurisdiction *is* a core concern of Title III." 736 F.3d at 515 (citing *United States* v. *North*, 728 F.3d 429, 437 (5th Cir.), withdrawn and superseded on reh'g, 735 F.3d 212 (5th Cir. 2013) (per curiam)). Unlike both *Adams* and *Glover*, however, this case does not involve

communications intercepted outside the jurisdiction of the issuing court. Any disagreement between the Eleventh and D.C. Circuits about whether interception that occurs in violation of Title III's territorial-jurisdiction limitation implicates a core concern thus is not implicated here.

4. Even if the question presented otherwise warranted review, this case would be an unsuitable vehicle to resolve it for two reasons. First, the language that the court of appeals viewed as a defect did not in fact render the orders insufficient on their face. As the D.C. Circuit explained in *Scurry*, "[t]o determine whether a wiretap order is facially insufficient, a reviewing court must examine the four corners of the order and establish whether, on its face, it contains all that Title III requires it to contain." 821 F.3d at 8. In both *Chavez* and *Giordano*, this Court held that wiretap orders were not facially insufficient where the orders included the information that Title III required. See *Chavez*, 416 U.S. at 573-574; *Giordano*, 416 U.S. at 525 n.14; see also *Moore*, 41 F.3d at 375 (judge's failure to sign wiretap order did not require suppression because "[Section] 2518(4) does not mandate a signed order"); cf. *Scurry*, 821 F.3d at 12 (deeming wiretap orders "facially insufficient" because, unlike in "the technical-defect cases the [D.C. Circuit] cited in *Glover*," the orders in *Scurry* "failed to include * * * information expressly required by Title III").

As discussed above, nothing in Title III requires that a wiretap order include a geographic limitation of the kind the court of appeals found lacking. See pp. 11-12, *supra*. Section 2518(4), which "enumerates certain categories of information that a wiretap order 'shall specify,'" *Scurry*, 821 F.3d at 8, does not mandate an express

territorial limitation. And because no such information is required to begin with, a wiretap order that contains inaccurate (and ultimately unnecessary) language regarding its territorial scope is not facially insufficient. A wiretap order cannot be said to be "*insufficient* on its face," 18 U.S.C. 2518(10)(a)(ii) (emphasis added), if it contains all of the information that is necessary under the statute. That threshold ground for affirming the decision below would impede any consideration of the question presented.

Second, even if the wiretap evidence was admitted erroneously, any error was harmless and casts no doubt on the convictions. Rule 52(a) of the Federal Rules of Criminal Procedure directs that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a); see *United States* v. *Olano*, 507 U.S. 725, 734-735 (1993). As the government explained in the court of appeals, each petitioner's guilt was established by overwhelming non-wiretap evidence—including the testimony of cooperating witnesses, business records, and law-enforcement surveillance. See 15-3236 Gov't C.A. Br. 32-33; 15-3237 Gov't C.A. Br. 33-34. The court of appeals did not reach this additional basis for affirmance only because it rejected petitioners' Title III arguments on other grounds. Pet. App. 25a n.8; see *id.* at 40a (rejecting Roosevelt Dahda's argument based on court's holding in Los Dahda's appeal). A ruling in petitioners' favor that the wiretap evidence should have been excluded thus is unlikely to affect the outcome.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
KENNETH A. BLANCO
Acting Assistant Attorney General
FINNUALA K. TESSIER
Attorney

SEPTEMBER 2017

RECORD AND BRIEFS

No. 17-43

In the Supreme Court of the United States

LOS ROVELL DAHDA AND ROOSEVELT RICO DAHDA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

RICK E. BAILEY
CONLEE, SCHMIDT & EMERSON, LLP
200 West Douglas Avenue, Suite 300
Wichita, KS 67202

EDWARD K. FEHLIG, JR.
FEHLIG & FEHLIG-TATUM, LLC
3002 South Jefferson Avenue, Suite 207
St. Louis, MO 63118

KANNON K. SHANMUGAM
Counsel of Record
ALLISON JONES RUSHING
J. LIAT ROME
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

TABLE OF AUTHORITIES

Page

Cases:

Heckler v. *Campbell*, 461 U.S. 458 (1983) 9
Hicks v. *United States*, 137 S. Ct. 2000 (2017) 10
United States v. *Chavez*, 416 U.S. 562 (1974) 7
United States v. *Donovan*, 429 U.S. 413 (1977) 8
United States v. *Giordano*, 416 U.S. 505 (1974) 7
United States v. *Glover*,
736 F.3d 509 (D.C. Cir. 2013) ..... *passim*
United States v. *Scurry*, 821 F.3d 1 (D.C. Cir. 2016) 4, 5

Statutes:

Title III, Omnibus Crime Control and Safe Streets
Act of 1968, 18 U.S.C. 2510-2520 ..... *passim*
18 U.S.C. 2518(3) 2, 5, 9, 10
18 U.S.C. 2518(4) 7, 9
18 U.S.C. 2518(10)(a) 2
18 U.S.C. 2518(10)(a)(i) 6, 7, 8
18 U.S.C. 2518(10)(a)(ii) ..... *passim*
18 U.S.C. 2518(10)(a)(iii) 6, 7

Miscellaneous:

Stephen M. Shapiro et al., *Supreme Court Practice*
(10th ed. 2013) 6

In the Supreme Court of the United States

No. 17-43

LOS ROVELL DAHDA AND ROOSEVELT RICO DAHDA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Remarkably, the government devotes virtually all of its brief in opposition to arguing the merits of its interpretation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520. When it comes to whether this Court should actually grant review, however, the government has conspicuously little to say. The government does not dispute that the question presented—whether Title III requires suppression of evidence obtained pursuant to a wiretap order that is facially insufficient because the order exceeds the judge's territorial jurisdiction—is an important and recurring one which

arises frequently in the lower courts, but which has never come before this Court.

While the government halfheartedly contends that the courts of appeals are not divided on the question presented, the government completely ignores the fact that the Tenth Circuit (in the decisions below) and the District of Columbia Circuit (in an earlier decision) have expressly recognized the existence of a circuit conflict. In fact, the circuits are in direct conflict both on the issue whether Title III's territorial-jurisdiction limitation implicates a "core concern" of the statute, and on the antecedent issue whether the extratextual "core concerns" requirement even applies in the context of facially insufficient wiretap orders. Those conflicts warrant the Court's review, and the government offers no valid reason to postpone it. The petition for a writ of certiorari should therefore be granted.

1. The government contends that the Tenth Circuit's decisions do not conflict with the decision of any other court of appeals. See Br. in Opp. 17-21. That contention is plainly incorrect.

In the decisions below, the Tenth Circuit acknowledged that, by holding that the territorial-jurisdiction limitation of Section 2518(3) did not implicate a "core concern" of Title III warranting suppression, it was creating a conflict with the D.C. Circuit's decision on that question in *United States* v. *Glover*, 736 F.3d 509 (2013). See Pet. App. 21a, 40a. And in *Glover*, the D.C. Circuit in turn recognized that, by holding that suppression is the mandatory remedy for evidence obtained pursuant to a facially insufficient order, it was creating a conflict with "a number of [its] sister circuits [that] have imported the core concerns test into paragraph (ii)" of Section 2518(10)(a). 736 F.3d at 513.

In the face of those express recognitions of a circuit conflict, the government takes a curious approach. The government acknowledges that "the courts of appeals have used different language in describing the types of insufficiencies that do not warrant suppression" and that "some have reached different conclusions regarding certain specific defects." Br. in Opp. 17. Yet it contends that the courts of appeals are in "general agreement" that "some defects" do not require suppression. *Id.* at 17-18.

At the impossibly high level of generality at which it is stated, that proposition may be true. But the salient inquiry for purposes of certiorari is whether there is a circuit conflict *on the question presented here*, which focuses on a particular type of defect: namely, whether suppression is required for evidence obtained pursuant to a wiretap order that is facially insufficient *because the order exceeds the judge's territorial jurisdiction*. See Pet. i. And concerning that type of defect, there can be no doubt that a conflict exists.

In the D.C. Circuit, "[s]uppression is the mandatory remedy when evidence is obtained pursuant to a facially insufficient warrant." *Glover*, 736 F.3d at 513. The D.C. Circuit does not conduct—and indeed forbids—an additional inquiry (like the Tenth Circuit conducted in these cases, see Pet. App. 21a, 40a) into whether the facial insufficiency results from the violation of a statutory provision that implicates the "core concerns" underlying Title III. See *Glover*, 736 F.3d at 513. Instead, the D.C. Circuit applies a "mechanical test" under which "[t]here is no room for judicial discretion." *Ibid.*

Perhaps the best evidence that the government is attempting to gloss over a circuit conflict is that it attributes to *petitioners* the argument that "subparagraph (ii) establishes 'a mechanical test'—*i.e.*, 'either the warrant is facially insufficient or it is not,'" Br. in Opp. 12 (citing Pet.

13), before contending that the argument is "incorrect," *ibid.* As the government fails to mention, however, petitioners were actually quoting from Judge Silberman's opinion for the D.C. Circuit in *Glover*. See Pet. 13 (quoting *Glover*, 736 F.3d at 513).

By applying a "mechanical test" for determining whether to suppress evidence collected pursuant to an order that is facially insufficient under paragraph (ii), the D.C. Circuit stands in conflict with those courts—including the Tenth Circuit in the decisions below—that require suppression only if there is a violation of a statutory requirement that implicates a "core concern" of Title III. See Pet. 15-16 (citing six other courts of appeals that apply the "core concerns" test). Clearly, the government disagrees with the "mechanical test" that the D.C. Circuit adopted. See Br. in Opp. 12. But that disagreement merely highlights the existence of a circuit conflict that warrants this Court's review.

Notably, the D.C. Circuit recently reiterated its adherence to the "mechanical test" for the suppression of evidence derived from a facially insufficient order. In *United States* v. *Scurry*, 821 F.3d 1 (2016), the D.C. Circuit reaffirmed that, if a wiretap authorization order is "insufficient on its face" under Section 2518(10)(a)(ii), "suppression is mandatory," without any additional requirement that the facial insufficiency must have resulted from the violation of a statutory requirement that implicates a "core concern" of Title III. *Id.* at 5, 13.

To be sure, as the government notes (Br. in Opp. 18), the D.C. Circuit acknowledged in *Scurry* that it had left open the possibility in *Glover* that a "technical defect" in a wiretap order "might not rise to the level of facial insufficiency." 821 F.3d at 12. Critically for present purposes, however, the D.C. Circuit did not suggest in *Scurry* that

a violation of the territorial-jurisdiction restriction in Section 2518(3) could be excused as such a "technical defect." To the contrary, in *Glover*, the court expressly rejected that proposition (and proceeded to hold that, even if an inquiry into the "core concerns" of Title III were required for suppression purposes, "territorial jurisdiction *is* a core concern of Title III"). 736 F.3d at 515. If anything, therefore, *Scurry* simply reinforces the D.C. Circuit's position on the question presented.

Faced with the obvious (and expressly recognized) conflicts both on the question whether violation of the territorial-jurisdiction limitation implicates the "core concerns" of Title III and on the antecedent question whether an inquiry into "core concerns" is even required at all, the government resorts to drawing irrelevant factual distinctions between *Glover* and the decisions below—including distinctions concerning whether the government explicitly intended to execute the wiretap order at issue outside the judge's jurisdiction, see Br. in Opp. 19, and whether communications were actually intercepted outside the judge's jurisdiction, see *id.* at 20. But there is no reason to believe that those factual distinctions were relevant to either court's analysis—and, given each court's recognition of the existence of a circuit conflict, there is good reason to believe they were not.

Instead, the pertinent legal question is whether "suppression is * * * required for [a] district court's authorization of wiretaps beyond the court's territorial jurisdiction." Pet. App. 21a. The answer to that question does not depend on any other factual considerations; it is the *authorization* to exceed the court's territorial jurisdiction that renders a wiretap order facially insufficient under Section 2518(10)(a)(ii). Accordingly, both in the decisions below and in *Glover*, the court focused on whether the au-

thorization was improper, not on whether communications were actually intercepted outside the judge's jurisdiction. See Pet. App. 21a-24a; *Glover*, 736 F.3d at 514.

In short, the government cannot sincerely dispute that the courts of appeals have announced and applied conflicting legal standards regarding whether suppression is the automatic remedy for evidence obtained pursuant to a facially insufficient order resulting from a violation of Title III's territorial-jurisdiction limitation—or that the resolution of that conflict would be outcome-determinative in these cases. Because there can be no doubt that these cases would have come out differently if they had been decided in the D.C. Circuit, there is a valid circuit conflict warranting the Court's review. See Stephen M. Shapiro et al., *Supreme Court Practice* § 6.31(a), at 479 (10th ed. 2013).

2. Tacitly recognizing that these cases are compelling candidates for further review, the government devotes the vast majority of its brief in opposition to an extended discussion of the merits. See Br. in Opp. 8-17. As we have already explained, the government's merits position is incorrect, largely for the reasons given by the D.C. Circuit in *Glover*. See Pet. 17-22. We address just a few additional points concerning the government's position here and leave the remainder to subsequent merits briefing if certiorari is granted.

To begin with, the government largely ignores the fact that this Court developed the "core concerns" test in an effort to distinguish paragraph (i) of Section 2518(10)(a) from paragraphs (ii) and (iii) and thereby give each paragraph independent content. See Pet. 18-20. The government attempts to argue forward from that limitation on paragraph (i), arguing that Congress could not have intended to allow *facial insufficiency* under paragraph (ii)

to result in suppression regardless of whether a "core concern" of the statute is implicated when *unlawful interception* under paragraph (i) does not result in suppression unless the "core concerns" test is satisfied. See Br. in Opp. 14-15.

But that argument simply takes issue with Congress's choice to include facial insufficiency as an independent ground for suppression in Title III. As this Court has held, "paragraphs (ii) and (iii) must be deemed to provide suppression for failure to observe some statutory requirements that would not render interceptions unlawful under paragraph (i)." *United States* v. *Giordano*, 416 U.S. 505, 527 (1974); see *United States* v. *Chavez*, 416 U.S. 562, 575 (1974). The whole point of this Court's decisions in *Chavez* and *Giordano* was to give independent content to each paragraph by limiting the scope of paragraph (i). Yet reading the same limitation into paragraph (ii) would defeat that objective and render paragraph (ii) entirely superfluous. The government fails to identify a single circumstance under its interpretation in which a facially insufficient warrant would unambiguously justify suppression under paragraph (ii) where the interception was lawful under paragraph (i). See Br. in Opp. 15.

Instead, the government timidly suggests that "a court *might* conclude that suppression is warranted under subparagraph (ii) even if the interception complied with the terms of the order and was not 'unlawful[]' under subparagraph (i)" in one circumstance: namely, where "the identity of the person whose communications are to be intercepted" was "known" under 18 U.S.C. 2518(4) but not included in the wiretap order. Br. in Opp. 15 (emphasis added). But the government offers no case law to support the proposition that suppression would be warranted in that circumstance under paragraph (ii)—nor could it,

given that the government's hypothetical closely resembles the facts of *United States* v. *Donovan*, 429 U.S. 413 (1977).

In *Donovan*, the relevant applications identified some persons whose communications were to be intercepted, but failed to identify additional known persons. 429 U.S. at 419-420. The Court initially stated that there was "no basis" to suggest the orders were facially insufficient under Section 2518(10)(a)(ii). *Id.* at 432. That made eminent sense, because it would have been impossible to detect from the four corners of the orders that they contained the defect of failing to identify the persons at issue. The Court proceeded to hold that the failure to identify those persons did not require suppression under paragraph (i) either, because it did not implicate the "core concerns" of Title III. See *id.* at 433-435. *Donovan* thus strongly suggests that, in the government's hypothetical, the defect either would not implicate paragraph (ii) at all, or would not satisfy the "core concerns" test even if it did.

The government thus cannot dodge the inescapable conclusion that paragraph (ii) would be entirely subsumed within paragraph (i) if the extratextual "core concerns" test were applied to it. Congress specifically chose to provide for suppression when the facial insufficiency of a wiretap order does not rise to the level of unlawful interception, and that choice cannot be overridden under the guise of statutory interpretation.

Finally on the merits, the government offers no valid response to petitioners' contention that, even if the "core concerns" test did apply here as a prerequisite to suppression, the failure to comply with Title III's territorial-jurisdiction limitation implicates the "core concerns" of the statute. See Pet. 20-22; *Glover*, 736 F.3d at 515. It is a fundamental principle of our legal system that courts may act only within their jurisdictions, and the government

does not dispute that the territorial-jurisdiction limitation at least limits forum shopping, even if it does not prevent it altogether. See Br. in Opp. 16-17.

3. The government does not dispute that the question presented in these cases is one of obvious importance to the federal criminal system or that the frequency with which the issue arises further supports review. Instead, the government makes two passing vehicle arguments, see Br. in Opp. 21-22, both of which are flawed and unpersuasive.

First, the government argues that the wiretap orders at issue here were not facially insufficient at all, because there is no affirmative requirement to specify a territorial limitation on the face of a Title III order. See Br. in Opp. 21-22; see also *id.* at 11-12. As a preliminary matter, the government did not raise that argument below, and it is therefore forfeited. See *Heckler* v. *Campbell*, 461 U.S. 458, 468 n.12 (1983).

In any event, any such argument would be insubstantial. Title III expressly permits a judge only to enter a wiretap order "authorizing or approving interception of wire, oral, or electronic communications *within the territorial jurisdiction of the court in which the judge is sitting*." 18 U.S.C. 2518(3) (emphasis added). While the statute proceeds in the next subsection (Section 2518(4)) to identify additional information that must be contained on the face of the order, we are aware of no court that has held that a Title III wiretap order need not include a territorial-jurisdiction limitation, notwithstanding the plain language of Section 2518(3)—much less that an order affirmatively authorizing interception "in any other jurisdiction within the United States," like the ones at issue here, is facially sufficient. See Pet. 6. The government similarly identifies no court that has adopted that counterintuitive position. Not surprisingly, therefore, both the

Tenth Circuit (in the decisions below) and the D.C. Circuit (in *Glover*) operated on the understanding that a violation of the territorial-jurisdiction limitation goes to the facial sufficiency of the order. See Pet. App. 15a, 20a; *Glover*, 736 F.3d at 515.

Second, the government argues that any error in the admission of the evidence from the wiretap orders was harmless. See Br. in Opp. 22. But that argument is also insubstantial. Any error here can hardly be deemed harmless in light of the court of appeals' acknowledgment that "[m]uch of the evidence" against petitioners was obtained through the wiretap orders, see Pet. App. 14a, 39a, and in light of the government's heavy reliance on the wiretap evidence in its own briefing, see 15-3236 Gov't C.A. Br. 3-6. In any event, the court of appeals ultimately reserved judgment on the harmlessness question. See Pet. App. 25a n.8. If this Court holds that the admission of the wiretap evidence was erroneous, it can leave harmlessness for the court of appeals to consider on remand, as it "routinely" does in similar cases. See *Hicks* v. *United States*, 137 S. Ct. 2000, 2000 (2017) (Gorsuch, J., concurring).

* * * * *

In sum, these cases present an acknowledged circuit conflict on a question of exceptional legal and practical importance. The Court should grant review to resolve the conflict and correct a chronic misinterpretation of a statutory provision that plays a central and growing role in the federal criminal system. The petition for a writ of certiorari should be granted.

Respectfully submitted.

RICK E. BAILEY
CONLEE, SCHMIDT
& EMERSON LLP
200 West Douglas Avenue,
Suite 300
Wichita, KS 67202

Counsel for Petitioner
Los Rovell Dahda

EDWARD K. FEHLIG, JR.
FEHLIG & FEHLIG-TATUM,
LLC
3002 South Jefferson
Avenue, Suite 207
St. Louis, MO 63118

Counsel for Petitioner
Roosevelt Rico Dahda

KANNON K. SHANMUGAM
ALLISON JONES RUSHING
J. LIAT ROME
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

Counsel for Petitioner
Los Rovell Dahda

SEPTEMBER 2017

No. 17-43

In the Supreme Court of the United States

LOS ROVELL DAHDA AND ROOSEVELT RICO DAHDA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOINT APPENDIX
VOLUME 1 OF 2 (PAGES 1-92)

KANNON K. SHANMUGAM
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

Counsel of Record
for Petitioners

NOEL J. FRANCISCO
Solicitor General
Department of Justice
Washington, DC 20530
(202) 514-2217
SupremeCtBriefs@usdoj.gov

Counsel of Record
for Respondent

PETITION FOR A WRIT OF CERTIORARI FILED: APRIL 25, 2017
CERTIORARI GRANTED: OCTOBER 16, 2017

TABLE OF CONTENTS

Page

VOLUME 1

Court of appeals docket entries 1
Court of appeals docket entries 5
District court docket entries 9
District court docket entries 19
Excerpts from suppression hearing transcript (Mar. 25, 2014) 32
Excerpts from suppression hearing transcript (Mar. 26, 2014) 36
Excerpts from suppression hearing transcript (Mar. 26, 2014) 50
Excerpts from suppression hearing transcript (Mar. 26, 2014) 53
Excerpts from suppression hearing transcript (Mar. 26, 2014) 64
Criminal judgment for Los Dahda (Oct. 5, 2015) 68
Criminal judgment for Roosevelt Dahda (Nov. 13, 2015) 80

VOLUME 2 (SEALED)

Wiretap order (Jan. 4, 2012) 93
Wiretap order (Jan. 19, 2012) 101
Wiretap order (Jan. 20, 2012) (amended) 110
Wiretap order (Feb. 17, 2012) 120
Wiretap order (Mar. 12, 2012) 128
Wiretap order (Mar. 20, 2012) 136
Wiretap order (Mar. 23, 2012) 145
Wiretap order (Apr. 5, 2012) 154
Wiretap order (Apr. 25, 2012) 163
Wiretap order (May 4, 2012) 170

The following opinions, decisions, judgments, and orders have been omitted in printing the joint appendix because they appear as appendices to the petition for certiorari as follows:

Appendix A:	Court of appeals opinion in *United States* v. *Los Rovell Dahda*, Apr. 4, 2017
Appendix B:	Court of appeals opinion in *United States* v. *Roosevelt Rico Dahda*, Apr. 4, 2017
Appendix C:	District court opinion, Apr. 16, 2014
Appendix D:	Magistrate report and recommendation, Apr. 2, 2014

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 15-3236

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

LOS ROVELL DAHDA,
Defendant-Appellant.

DOCKET ENTRIES

DATE	PROCEEDINGS
10/06/2015	[10308072] Criminal case docketed. Preliminary record filed. DATE RECEIVED: 10/06/2015. Docketing statement, designation of record, transcript order form, appointment motion and notice of appearance due on 10/20/2015 for Los Rovell Dahda; notice of appearance due on 10/20/2015 for United States of America. [15-3236] [Entered: 10/06/2015 09:56 AM]
10/20/2015	[10312402] Designation of record filed by Appellant Los Rovell Dahda. Served on 10/20/2015. Manner of Service: email. [15-3236]

DATE	PROCEEDINGS
	RWJ [Entered: 10/20/2015 03:17 PM]
	* * * * *
10/26/2015	[10313857] Record on appeal filed. No. of Volumes: 2 (Volume I - Pleadings & Transcript and Volume II - SEALED Pleadings). Appellant's brief due on 12/07/2015 for Los Rovell Dahda. [15-3236] [Entered: 10/26/2015 02:26 PM]
	* * * * *
12/28/2015	[10329828] Designation of record filed by Appellant Los Rovell Dahda. Served on 12/28/2015. Manner of Service: email. [15-3236] REB [Entered: 12/28/2015 01:58 PM]
	* * * * *
02/09/2016	[10341497] Supplemental record on appeal filed. No. of Volumes: 2 (Supplemental Volume I - Pleadings and Supplemental Volume II - Transcripts). [15-3236] [Entered: 02/09/2016 08:28 AM]
	* * * * *
05/20/2016	[10371253] Appellant/Petitioner's brief filed by Los Rovell Dahda. 7 paper copies to be provided to the court. Served on 05/20/2016 by email. Oral argument requested?

DATE	PROCEEDINGS
	Yes. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [15-3236] REB [Entered: 05/20/2016 07:46 PM]
	* * * * *
08/17/2016	[10397443] Supplemental record on appeal filed pursuant to the court's 08/17/2016 order. No. of Volumes: 1 (Supplemental Volume III - Trial exhibits 627 through 905). [15-3236] [Entered: 08/17/2016 12:58 PM]
08/24/2016	[10399353] Appellee/Respondent's brief filed by United States of America. 7 paper copies to be provided to the court. Served on: 08/24/2016. Manner of service: email. Oral argument requested? Yes. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [15-3236] CNC [Entered: 08/24/2016 11:00 AM]
	* * * * *
09/26/2016	[10408484] Appellant/Petitioner's reply brief filed by Los Rovell Dahda. 7 paper copies to be provided to the court. Served on 09/26/2016. Manner of Service: email. This pleading complies with all required (privacy, paper copy

DATE	PROCEEDINGS
	and virus) certifications: Yes. [15-3236] REB [Entered: 09/26/2016 02:22 PM]
	* * * * *
01/19/2017	[10437538] Case argued by Rick Bailey for the Appellant; Carrie Capwell for the Appellee; and submitted to Judges Lucero, Gorsuch and Bacharach. [15-3236] [Entered: 01/19/2017 11:37 AM]
	* * * * *
01/27/2017	[10440128] Supplemental record on appeal filed. No. of Volumes: 2 – Government's (SEALED) trial exhibits 1 - 30. (Supplemental Volumes 4 and 5). [15-3236] [Entered: 01/27/2017 02:53 PM]
04/04/2017	[10456614] Affirmed in part, reversed in part, and remanded. Terminated on the merits after oral hearing. Written, signed, published; Judges Lucero, concurring and Bacharach, authoring judge. Mandate to issue. [15-3236] [Entered: 04/04/2017 11:08 AM]
04/04/2017	[10456615] Judgment for opinion filed. [15-3236] [Entered: 04/04/2017 11:10 AM]
04/26/2017	[10462320] Mandate issued. [15-3236] [Entered: 04/26/2017 08:25 AM]

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 15-3237

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

ROOSEVELT RICO DAHDA, Defendant-Appellant.

DOCKET ENTRIES

DATE	PROCEEDINGS
10/07/2015	[10308438] Criminal case docketed. Preliminary record filed. DATE RECEIVED: 10/07/2015. Docketing statement, designation of record, transcript order form, appointment motion and notice of appearance due on 10/21/2015 for Roosevelt Rico Dahda; notice of appearance due on 10/21/15 United States of America. [15-3237] [Entered: 10/07/2015 10:20 AM]
	* * * * *
10/20/2015	[10312314] Designation of record filed by Appellant Roosevelt Rico Dahda. Served on 10/20/2015. Manner of Service: email. [15-3237]

DATE	PROCEEDINGS
	MLB [Entered: 10/20/2015 01:44 PM]
	* * * * *
11/13/2015	[10318831] Record on appeal filed. No. of Volumes: 5 (Volume I - Pleadings; Volumes II and III - Transcripts; Volume IV - SEALED Pleadings; and Volume V - Government Sentencing Exhibits). Appellant's brief due on 12/23/2015 for Roosevelt Rico Dahda. –[Edited 11/18/2015 by MB to correct revised attachment][15-3237] [Entered: 11/13/2015 08:27 AM]
11/16/2015	[10319276] Supplemental record on appeal filed. No. of Volumes: 2, Comments: Vol I - Pleadings; Vol II - Sealed Pleadings. [15-3237] [Entered: 11/16/2015 09:18 AM]
	* * * * *
11/25/2015	[10322239] Supplemental record on appeal filed. No. of Volumes: 1, Comments: Sup Vol 3 - pleadings. [15-3237] [Entered: 11/25/2015 08:52 AM]
	* * * * *
01/14/2016	[10334504] Supplemental record on appeal filed. Vol. 4 - Containing government's trial exhibits, jury instructions, and verdict. [15-3237] [Entered: 01/14/2016 10:35 AM]

DATE	PROCEEDINGS
01/22/2016	[10336833] Appellant/Petitioner's brief filed by Roosevelt Rico Dahda. 7 paper copies to be provided to the court. Served on 01/22/2016 by email. Oral argument requested? Yes. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [15-3237] MLB [Entered: 01/22/2016 01:48 PM]
	* * * * *
04/27/2016	[10363147] Appellee/Respondent's brief filed by United States of America. 7 paper copies to be provided to the court. Served on: 04/27/2016. Manner of service: email. Oral argument requested? Yes. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [15-3237] CNC [Entered: 04/27/2016 01:36 PM]
	* * * * *
05/31/2016	[10373595] Appellant/Petitioner's reply brief filed by Roosevelt Rico Dahda. 7 paper copies to be provided to the court. Served on 05/31/2016. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [15-3237] --[Edited 06/07/2016 by SLS

DATE	PROCEEDINGS
	to remove docket entry from 15-3236.] MLB [Entered: 05/31/2016 09:14 AM]
	* * * * *
01/19/2017	[10437541] Case argued by Mark Bennett for the Appellant; Carrie Capwell for the Appellee; and submitted to Judges Lucero, Gorsuch and Bacharach. [15-3237] [Entered: 01/19/2017 11:42 AM]
	* * * * *
01/27/2017	[10440018] Supplemental record on appeal filed. No. of Volumes: 2. Supplemental Volumes IV & V - SEALED Government Exhibits. [15-3237] --[Edited 01/27/2017 by SLS to replace transmittal letter.] [Entered: 01/27/2017 11:45 AM]
04/04/2017	[10456618] Affirmed and Remanded. Terminated on the merits after oral hearing. Written, signed, published. Judges Lucero and Bacharach (authoring). Mandate to issue. [15-3237] [Entered: 04/04/2017 11:15 AM]
04/04/2017	[10456631] Judgment for opinion filed. [15-3237] [Entered: 04/04/2017 11:34 AM]
04/26/2017	10462324] Mandate issued. [15-3237] [Entered: 04/26/2017 08:29 AM]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

No. 12 cr 20083-01

UNITED STATES, Plaintiff,

v.

LOS ROVELL DAHDA,
Defendant.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
06/11/2012	1	SEALED COMPLAINT as to Los Rovell Dahda (1), Roosevelt Rico Dahda (2), Sadie Jolynn Brown (3), Justin Cherif Pickel (4), David James Essman (5), Amos Moses Hurst (6), Phillip Villereal Alarcon (7), Jeffery David Paiva (8), Mark Lee Romero (9), Samuel Villeareal, III (10), Peter Park (11), Wayne Suhan Swift (12), Charles Thomas Kreisler (13), James Michael Soderling (14), Simon Andrew Tyson (15), Trent Jordan Percival (16), Chad William Pollard (17), Jason Marcus Hansen (18), Daniel Mark Sieber (19), Justin Jerome Mercer

DATE	NO.	PROCEEDINGS
		(20), Jacob Paul Forbes (21), Chad Eugene Bauman (22), Carey Lynn Willming (23), Michael Shane Witt (24), Stephen Mallsion Rector (25). (Sealed User KAO) Modified on 6/13/2012 to unseal per Notice of Arrest. (kao) [2:12-mj-08126-JPO] (Entered: 06/12/2012)
		* * * * *
07/11/2012	192	SEALED INDICTMENT (unsealed upon arrest) as to Los Rovell Dahda (1) on counts 1, 3, 22, 25, 29-30, 31, 33, 35, 36-37, 38, 40-41, 42, 44-45, 47, 48, 72, 84, and 87; as to Roosevelt Rico Dahda (2) on counts 1, 41, 42, 44, 46, 48, 51-52, 54, 55, 69, and 72; as to Sadie Jolynn Brown (3) on counts 1, 42, 52-54, and 55; as to Justin Cherif Pickel (4) on counts 1, 29, 36, 42, 69, and 72; as to David James Essman (5) on counts 1 and 37; as to Amos Moses Hurst (6) on counts 1, 40, and 42; as to Phillip Villereal Alarcon (7) on counts 1, 38, 42, and 45; as to Jeffery David Paiva (8) on counts 1 and 42; as to Mark Lee Romero (9) on counts 1, 46, 53, and 55; as to Samuel Villeareal, III (10) on counts 1, 16, and 51; as to Peter Park (11) on counts 1, 42, 48, 63-66, 67, 68, 70, 71, 73, 74, 75, 77, 78, 79-80, 81, 82-83, 84-85, 86, 87,

DATE	NO.	PROCEEDINGS
		88-91, 93, and 100; as to Wayne Suhan Swift (12) on counts 1, 42, 63, 67, 77, 84, 86, and 87; as to Charles Thomas Kreisler (13) on counts 1, 66, 67, and 77; as to James Michael Soderling (14) on counts 1, 26, 27, 28, 67, 70, 77, 84, 85, and 93; as to Simon Andrew Tyson (15) on counts 1 and 65; as to Trent Jordan Percival (16) on counts 1, 78, 79-80, 83, 95, and 96; as to Chad William Pollard (17) on counts 1, 79-80, and 83; as to Jason Marcus Hansen (18) on counts 1, 75, and 89; as to Daniel Mark Sieber (19) on counts 1, 74, 88, 90-91, and 97; as to Justin Jerome Mercer (20) on counts 1, 80, 81, and 82; as to Jacob Paul Forbes (21) on counts 1, 59, and 64; as to Chad Eugene Bauman (22) on counts 1, 2, 3, 4-6, 7, 8, 9, 10, 11, 15, 17, 19, 20, 22-23, 24, 32, 34, 39, 43, 49, 50, 56, 57, 58, 60-61, 62, 76, 92, 94, and 101; as to Carey Lynn Willming (23) on counts 1, 2, 12-14, and 57; as to Michael Shane Witt (24) on counts 1 and 58; as to Stephen Mallsion Rector (25) on counts 1, 2, 18, and 56; as to Michael J. Berry (26) on counts 1, 21, and 98; as to Adam Christiansen (27) on count 1; as to Aaron C. Gunderson (28) on counts 1, 92, and 101; as to Nathan Wallace (29) on counts 1, 42, 47, 48, and 99; as to

DATE	NO.	PROCEEDINGS
		Ryan Kearns (30) on counts 1 and 9; as to Karl Havener (31) on counts 1 and 9; as to Damien J. Mick (32) on counts 1, 62, and 94; as to Joshua Simpson (33) on counts 1 and 10; as to Sarah Soderling (34) on counts 1 and 93; and as to Elizabeth Dominique Watson (35) on counts 1, 71, and 73. (mg) (Counts Corrected as to Defendants Swift (12) and Soderling (14) on 7/12/2012. (mg)) (Entered: 07/12/2012)
		* * * * *
10/31/2012	462	SEALED SUPERSEDING INDICTMENT (unsealed upon arrest) as to Los Rovell Dahda (1) on counts 1s, 3s, 23s, 26s, 30s-31s, 32s, 34s, 36s, 37s-39s, 41s-42s, 43s, 45s-46s, 48s, 49s, 73s, 85s, and 88s; as to Roosevelt Rico Dahda (2) on counts 1s, 42s, 43s, 45s, 47s, 49s, 52s-53s, 55s, 56s, 70s, and 73s; as to Sadie Jolynn Brown (3) on counts 1s, 43s, 53s-55s, and 56s; as to Justin Cherif Pickel (4) on counts 1s, 30s, 37s, 43s, 70s, and 73s; as to David James Essman (5) on counts 1s and 38s; as to Amos Moses Hurst (6) on counts 1s, 41s, and 43s; as to Phillip Villereal Alarcon (7) on counts 1s, 39s, 43s, and 46s; as to Jeffery David Paiva (8) on counts 1s and 43s; as to Mark Lee Romero (9) on counts 1s,

DATE	NO.	PROCEEDINGS
		47s, 54s, and 56s; as to Samuel Villeareal, III (10) on counts 1s, 17s, and 52s; as to Peter Park (11) on counts 1s, 43s, 49s, 64s- 67s, 68s, 69s, 71s, 72s, 74s, 75s, 76s, 78s, 79s, 80s, 81s, 82s, 83s, 84s, 85s, 86s, 87s, 88s, 89s, 90s, 91s-92s, 94s, and 101s; as to Wayne Suhan Swift (12) on counts 1s, 43s, 64s, 68s, 78s, 85s, 87s, and 88s; as to Charles Thomas Kreisler (13) on counts 1s, 67s, 68s, and 78s; as to James Michael Soderling (14) on counts 1s, 27s, 28s, 29s, 68s, 71s, 78s, 85s, 86s, and 94s; as to Simon Andrew Tyson (15) on counts 1s and 66s; as to Trent Jordan Percival (16) on counts 1s, 79s, 80s, 81s, 84s, 96s, and 97s; as to Chad William Pollard (17) on counts 1s, 80s, 81s, and 84s; as to Jason Marcus Hansen (18) on counts 1s, 76s, and 90s; as to Daniel Mark Sieber (19) on counts 1s, 75s, 89s, 91s-92s, and 98s; as to Justin Jerome Mercer (20) on counts 1s, 81s, 82s, and 83s; as to Jacob Paul Forbes (21) on counts 1s, 60s, and 65s; as to Chad Eugene Bauman (22) on counts 1s, 2s, 3s, 5s-6s, 7s-8s, 9s, 10s, 11s, 12s, 16s, 18s, 20s, 21s, 23s, 24s, 25s, 33s, 35s, 40s, 44s, 50s, 51s, 57s, 58s, 59s, 61s-62s, 63s, 77s, 93s, 95s, and 102s; as to Carey Lynn Willming (23) on counts 1s,

DATE	NO.	PROCEEDINGS
		2s, 13s-15s, and 58s; as to Michael Shane Witt (24) on counts 1s and 59s; as to Stephen Mallsion Rector (25) on counts 1s, 2s, 19s, and 57s; as to Michael J. Berry (26) on counts 1s, 22s, and 99s; as to Adam Christiansen (27) on count 1s; as to Aaron C. Gunderson (28) on counts 1s, 93s, and 102s; as to Nathan Wallace (29) on counts 1s, 43s, 48s, 49s, and 100s; as to Ryan Kearns (30) on counts 1s and 10s; as to Karl Havener (31) on counts 1s and 10s; as to Damien J. Mick (32) on counts 1s, 63s, and 95s; as to Joshua Simpson (33) on counts 1s and 11s; as to Sarah Soderling (34) on counts 1s and 94s; as to Elizabeth Dominique Watson (35) on counts 1s, 72s, and 74s; as to Jean Francois Quintin (36) on counts 1 and 4; as to Steven Stegall (37) on counts 1 and 103; as to David G. Hale (38) on count 1; as to Henry McCusker (39) on count 1; as to John Paul McMillan (40) on counts 1, 27, and 94; as to Erin M. Keller (41) on count 1; as to Jeffrey Wall (42) on count 1; and as to Richard W. Smith, Jr. (43) on count 1. (mg) (Entered: 11/06/2012)

* * * * *

DATE	NO.	PROCEEDINGS
01/02/2014	1143	MOTION to Suppress Contents of Communications Intercepted Pursuant to Orders Insufficient on Their Face by Los Rovell Dahda as to Los Rovell Dahda. (Johnson, Richard) **(Co-defendants Roosevelt Rico Dahda and David Essman have joined in this motion.) (Entered: 01/02/2014)**
		* * * * *
02/06/2014	1179	Consolidated RESPONSE TO MOTIONS by USA as to Los Rovell Dahda, Roosevelt Rico Dahda, Justin Cherif Pickel, David James Essman, Amos Moses Hurst, Jean Francois Quintin, John Paul McMillan, Erin M. Keller, Richard W. Smith, Jr. re: 1110 MOTION To Allow Case Agent/Investigator To Not Be Subject to Sequestration Rule, 1139 MOTION for Hearing To Identify and Determine Admissibility of Co-Conspirator Statements and Request for Pre-Trial Hearing, 1140 MOTION to Suppress Evidence, 1098 MOTION to Exclude Co-Conspirators' Statements, 1109 MOTION for Disclosure Of Exculpatory Evidence, 1096 MOTION for Bill of Particulars, 1090 MOTION for a James Hearing, 1104 MOTION For Ade-

DATE	NO.	PROCEEDINGS
		quate Court Facilities, 1145 MOTION to Suppress the Contents of Unlawfully Intercepted Communications, 1094 MOTION in Limine To Exclude Evidence By Non- Testifying Co-Defendants, 1143 MOTION to Suppress Contents of Communications Intercepted Pursuant to Orders Insufficient on Their Face, 1115 MOTION to Dismiss IndictmentMOTION (Request) for Evidentiary Hearing, 1106 MOTION for Disclosure Of Grand Jury Transcripts, 1102 MOTION for Disclosure Of Confidential Informants, 1108 MOTION to Exclude Bruton Evidence, 1100 MOTION For An Order Requiring The Government To Give Notice Of Its Intent To Offer Rule 404(b) Evidence, 1092 MOTION for Disclosure Of Co-Conspirator Statements. (Maag, Jared) (Entered: 02/06/2014)
		* * * * *
04/02/2014	1251	REPORT AND RECOMMENDATIONS as to Los Rovell Dahda's 1143 MOTION to Suppress Contents of Communications Intercepted Pursuant to Orders Insufficient on Their Face. Objections to R&R due by 4/16/2014. Signed by Magistate Judge James P. O'Hara

DATE	NO.	PROCEEDINGS
		on 4/2/2014. (ah) (Entered: 04/02/2014)
		* * * * *
04/16/2014	1336	ORDER - Defendant Los Dahda's Objections To The Magistrate's Reports And Recommendations 1327 filed April 15, 2014 be and hereby are OVERRULED and Defendant Justin C. Pickel's Objections to Report And Recommendations 1328 be and hereby ADOPTS Magistrate Judge James P. O'Hara's 1249, 1250 and 1251 Report and Recommendations and overrules 1143, 1145 and 1140 Motions to Suppress. Signed by Chief Judge Kathryn H. Vratil on 4/16/2014. (ck) (Entered: 4/16/2014)
		* * * * *
07/23/2014	1433	JURY VERDICT as to Los Rovell Dahda (1) - Found Guilty on Counts 1s, 26s, 31s, 36s, 38s-39s, 41s-42s, 43s, 45s-46s, 49s, 73s, 85s, and 88s, and Not Guilty on Counts 3s, 23s, 30s, 32s, 34s, 37s, and 48s of the 462 Superseding Indictment; as to Roosevelt Rico Dahda (2) - Found Guilty on Counts 1s, 42s, 43s, 45s, 49s, 53s, 55s, 56s, 70s, and 73s, and Not Guilty on Counts 47s, and 52s of the 462 Superseding Indictment; and as to Justin Cherif Pickel (4) -

DATE	NO.	PROCEEDINGS
		Found Guilty on Counts 1s and 70s, and Not Guilty on Counts 37s, 43s, and 73s of the 462 Superseding Indictment. (mg) (Entered: 7/25/2014)
		* * * * *
10/05/2015	2076	JUDGMENT as to Los Rovell Dahda (1) - Counts: 1s, 26s, 31s, 36s, 38s-39s, 41s-42s, 43s, 45s-46s, 49s, 73s, 85s, 88s - The defendant sentenced to 189 months. This term of imprisonment consists of 189 months on each Counts 1 and 31; 60 months on each of Counts 26, 36, 43, 49, 73, 85 and 88; and 48 months on each of Counts 38, 39, 41, 42, 45 and 46, all counts to be served concurrently. Upon release from imprisonment, the defendant shall be on supervised release for a term of 10 years. This term of supervised release consists of 10 years on each of Counts 1, 26, 36, 43, 49, 73, 85 and 88; 3 years on Count 31; and 1 year on each of Counts 38, 39, 41, 42, 45 and 46, all counts to be served concurrently. $1,500 special assessment. $16,985,250.00 fine. Counts 23s, 30s, 32s, 34s, 37s, 3s, 48s – Defendant Signed by District Judge Kathryn H. Vratil on 10/5/15. (kao) (Entered: 10/05/2015)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

No. 12 cr 20083-02

UNITED STATES, Plaintiff,

v.

ROOSEVELT RICO DAHDA, Defendant.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
06/11/2012	1	SEALED COMPLAINT as to Los Rovell Dahda (1), Roosevelt Rico Dahda (2), Sadie Jolynn Brown (3), Justin Cherif Pickel (4), David James Essman (5), Amos Moses Hurst (6), Phillip Villereal Alarcon (7), Jeffery David Paiva (8), Mark Lee Romero (9), Samuel Villeareal, III (10), Peter Park (11), Wayne Suhan Swift (12), Charles Thomas Kreisler (13), James Michael Soderling (14), Simon Andrew Tyson (15), Trent Jordan Percival (16), Chad William Pollard (17), Jason Marcus Hansen (18), Daniel Mark Sieber (19), Justin Jerome Mercer

DATE	NO.	PROCEEDINGS
		(20), Jacob Paul Forbes (21), Chad Eugene Bauman (22), Carey Lynn Willming (23), Michael Shane Witt (24), Stephen Mallsion Rector (25). (Sealed User KAO) Modified on 6/13/2012 to unseal per Notice of Arrest. (kao) [2:12-mj-08126-JPO] (Entered: 06/12/2012)
		* * * * *
07/11/2012	192	SEALED INDICTMENT (unsealed upon arrest) as to Los Rovell Dahda (1) on counts 1, 3, 22, 25, 29-30, 31, 33, 35, 36-37, 38, 40-41, 42, 44-45, 47, 48, 72, 84, and 87; as to Roosevelt Rico Dahda (2) on counts 1, 41, 42, 44, 46, 48, 51-52, 54, 55, 69, and 72; as to Sadie Jolynn Brown (3) on counts 1, 42, 52-54, and 55; as to Justin Cherif Pickel (4) on counts 1, 29, 36, 42, 69, and 72; as to David James Essman (5) on counts 1 and 37; as to Amos Moses Hurst (6) on counts 1, 40, and 42; as to Phillip Villereal Alarcon (7) on counts 1, 38, 42, and 45; as to Jeffery David Paiva (8) on counts 1 and 42; as to Mark Lee Romero (9) on counts 1, 46, 53, and 55; as to Samuel Villeareal, III (10) on counts 1, 16, and 51; as to Peter Park (11) on counts 1, 42, 48, 63-66, 67, 68, 70, 71, 73, 74, 75, 77, 78, 79-80, 81, 82-83, 84-85, 86, 87,

DATE	NO.	PROCEEDINGS
		88-91, 93, and 100; as to Wayne Suhan Swift (12) on counts 1, 42, 63, 67, 77, 84, 86, and 87; as to Charles Thomas Kreisler (13) on counts 1, 66, 67, and 77; as to James Michael Soderling (14) on counts 1, 26, 27, 28, 67, 70, 77, 84, 85, and 93; as to Simon Andrew Tyson (15) on counts 1 and 65; as to Trent Jordan Percival (16) on counts 1, 78, 79-80, 83, 95, and 96; as to Chad William Pollard (17) on counts 1, 79-80, and 83; as to Jason Marcus Hansen (18) on counts 1, 75, and 89; as to Daniel Mark Sieber (19) on counts 1, 74, 88, 90-91, and 97; as to Justin Jerome Mercer (20) on counts 1, 80, 81, and 82; as to Jacob Paul Forbes (21) on counts 1, 59, and 64; as to Chad Eugene Bauman (22) on counts 1, 2, 3, 4-6, 7, 8, 9, 10, 11, 15, 17, 19, 20, 22-23, 24, 32, 34, 39, 43, 49, 50, 56, 57, 58, 60-61, 62, 76, 92, 94, and 101; as to Carey Lynn Willming (23) on counts 1, 2, 12-14, and 57; as to Michael Shane Witt (24) on counts 1 and 58; as to Stephen Mallsion Rector (25) on counts 1, 2, 18, and 56; as to Michael J. Berry (26) on counts 1, 21, and 98; as to Adam Christiansen (27) on count 1; as to Aaron C. Gunderson (28) on counts 1, 92, and 101; as to Nathan Wallace (29) on counts 1, 42, 47, 48, and 99; as to

DATE	NO.	PROCEEDINGS
		Ryan Kearns (30) on counts 1 and 9; as to Karl Havener (31) on counts 1 and 9; as to Damien J. Mick (32) on counts 1, 62, and 94; as to Joshua Simpson (33) on counts 1 and 10; as to Sarah Soderling (34) on counts 1 and 93; and as to Elizabeth Dominique Watson (35) on counts 1, 71, and 73. (mg) (Counts Corrected as to Defendants Swift (12) and Soderling (14) on 7/12/2012. (mg)) (Entered: 07/12/2012)
		* * * * *
10/31/2012	462	SEALED SUPERSEDING INDICTMENT (unsealed upon arrest) as to Los Rovell Dahda (1) on counts 1s, 3s, 23s, 26s, 30s-31s, 32s, 34s, 36s, 37s-39s, 41s-42s, 43s, 45s-46s, 48s, 49s, 73s, 85s, and 88s; as to Roosevelt Rico Dahda (2) on counts 1s, 42s, 43s, 45s, 47s, 49s, 52s-53s, 55s, 56s, 70s, and 73s; as to Sadie Jolynn Brown (3) on counts 1s, 43s, 53s-55s, and 56s; as to Justin Cherif Pickel (4) on counts 1s, 30s, 37s, 43s, 70s, and 73s; as to David James Essman (5) on counts 1s and 38s; as to Amos Moses Hurst (6) on counts 1s, 41s, and 43s; as to Phillip Villereal Alarcon (7) on counts 1s, 39s, 43s, and 46s; as to Jeffery David Paiva (8) on counts 1s and 43s; as to Mark Lee Romero (9) on counts 1s,

DATE	NO.	PROCEEDINGS
		47s, 54s, and 56s; as to Samuel Villeareal, III (10) on counts 1s, 17s, and 52s; as to Peter Park (11) on counts 1s, 43s, 49s, 64s- 67s, 68s, 69s, 71s, 72s, 74s, 75s, 76s, 78s, 79s, 80s, 81s, 82s, 83s, 84s, 85s, 86s, 87s, 88s, 89s, 90s, 91s-92s, 94s, and 101s; as to Wayne Suhan Swift (12) on counts 1s, 43s, 64s, 68s, 78s, 85s, 87s, and 88s; as to Charles Thomas Kreisler (13) on counts 1s, 67s, 68s, and 78s; as to James Michael Soderling (14) on counts 1s, 27s, 28s, 29s, 68s, 71s, 78s, 85s, 86s, and 94s; as to Simon Andrew Tyson (15) on counts 1s and 66s; as to Trent Jordan Percival (16) on counts 1s, 79s, 80s, 81s, 84s, 96s, and 97s; as to Chad William Pollard (17) on counts 1s, 80s, 81s, and 84s; as to Jason Marcus Hansen (18) on counts 1s, 76s, and 90s; as to Daniel Mark Sieber (19) on counts 1s, 75s, 89s, 91s-92s, and 98s; as to Justin Jerome Mercer (20) on counts 1s, 81s, 82s, and 83s; as to Jacob Paul Forbes (21) on counts 1s, 60s, and 65s; as to Chad Eugene Bauman (22) on counts 1s, 2s, 3s, 5s-6s, 7s-8s, 9s, 10s, 11s, 12s, 16s, 18s, 20s, 21s, 23s, 24s, 25s, 33s, 35s, 40s, 44s, 50s, 51s, 57s, 58s, 59s, 61s-62s, 63s, 77s, 93s, 95s, and 102s; as to Carey Lynn Willming (23) on counts 1s,

DATE	NO.	PROCEEDINGS
		2s, 13s-15s, and 58s; as to Michael Shane Witt (24) on counts 1s and 59s; as to Stephen Mallsion Rector (25) on counts 1s, 2s, 19s, and 57s; as to Michael J. Berry (26) on counts 1s, 22s, and 99s; as to Adam Christiansen (27) on count 1s; as to Aaron C. Gunderson (28) on counts 1s, 93s, and 102s; as to Nathan Wallace (29) on counts 1s, 43s, 48s, 49s, and 100s; as to Ryan Kearns (30) on counts 1s and 10s; as to Karl Havener (31) on counts 1s and 10s; as to Damien J. Mick (32) on counts 1s, 63s, and 95s; as to Joshua Simpson (33) on counts 1s and 11s; as to Sarah Soderling (34) on counts 1s and 94s; as to Elizabeth Dominique Watson (35) on counts 1s, 72s, and 74s; as to Jean Francois Quintin (36) on counts 1 and 4; as to Steven Stegall (37) on counts 1 and 103; as to David G. Hale (38) on count 1; as to Henry McCusker (39) on count 1; as to John Paul McMillan (40) on counts 1, 27, and 94; as to Erin M. Keller (41) on count 1; as to Jeffrey Wall (42) on count 1; and as to Richard W. Smith, Jr. (43) on count 1. (mg) (Entered: 11/06/2012)

* * * * *

DATE	NO.	PROCEEDINGS
01/02/2014	1143	MOTION to Suppress Contents of Communications Intercepted Pursuant to Orders Insufficient on Their Face by Los Rovell Dahda as to Los Rovell Dahda. (Johnson, Richard) **(Co-defendants Roosevelt Rico Dahda and David Essman have joined in this motion.) (Entered: 01/02/2014)**
		* * * * *
02/06/2014	1179	Consolidated RESPONSE TO MOTIONS by USA as to Los Rovell Dahda, Roosevelt Rico Dahda, Justin Cherif Pickel, David James Essman, Amos Moses Hurst, Jean Francois Quintin, John Paul McMillan, Erin M. Keller, Richard W. Smith, Jr. re: 1110 MOTION To Allow Case Agent/Investigator To Not Be Subject to Sequestration Rule, 1139 MOTION for Hearing To Identify and Determine Admissibility of Co-Conspirator Statements and Request for Pre-Trial Hearing, 1140 MOTION to Suppress Evidence, 1098 MOTION to Exclude Co-Conspirators' Statements, 1109 MOTION for Disclosure Of Exculpatory Evidence, 1096 MOTION for Bill of Particulars, 1090 MOTION for a James Hearing, 1104 MOTION For Ade-

DATE	NO.	PROCEEDINGS
		quate Court Facilities, 1145 MOTION to Suppress the Contents of Unlawfully Intercepted Communications, 1094 MOTION in Limine To Exclude Evidence By Non- Testifying Co-Defendants, 1143 MOTION to Suppress Contents of Communications Intercepted Pursuant to Orders Insufficient on Their Face, 1115 MOTION to Dismiss IndictmentMOTION (Request) for Evidentiary Hearing, 1106 MOTION for Disclosure Of Grand Jury Transcripts, 1102 MOTION for Disclosure Of Confidential Informants, 1108 MOTION to Exclude Bruton Evidence, 1100 MOTION For An Order Requiring The Government To Give Notice Of Its Intent To Offer Rule 404(b) Evidence, 1092 MOTION for Disclosure Of Co-Conspirator Statements. (Maag, Jared) (Entered: 02/06/2014)
		* * * * *
04/02/2014	1251	REPORT AND RECOMMENDATIONS as to Los Rovell Dahda's 1143 MOTION to Suppress Contents of Communications Intercepted Pursuant to Orders Insufficient on Their Face. Objections to R&R due by 4/16/2014. Signed by Magistate Judge James P. O'Hara

DATE	NO.	PROCEEDINGS
		on 4/2/2014. (ah) (Entered: 04/02/2014)
		* * * * *
04/16/2014	1336	ORDER - Defendant Los Dahda's Objections To The Magistrate's Reports And Recommendations 1327 filed April 15, 2014 be and hereby are OVERRULED and Defendant Justin C. Pickel's Objections to Report And Recommendations 1328 be and hereby are OVERRULED. The court hereby ADOPTS Magistrate Judge James P. O'Hara's 1249, 1250 and 1251 Report and Recommendations and overrules 1143, 1145 and 1140 Motions to Suppress. Signed by Chief Judge Kathryn H. Vratil on 4/16/2014. (ck) (Entered: 04/16/2014)
		* * * * *
07/23/2014	1433	JURY VERDICT as to Los Rovell Dahda (1) - Found Guilty on Counts 1s, 26s, 31s, 36s, 38s-39s, 41s-42s, 43s, 45s-46s, 49s, 73s, 85s, and 88s, and Not Guilty on Counts 3s, 23s, 30s, 32s, 34s, 37s, and 48s of the 462 Superseding Indictment; as to Roosevelt Rico Dahda (2) - Found Guilty on Counts 1s, 42s, 43s, 45s, 49s, 53s, 55s, 56s, 70s, and 73s, and Not Guilty on Counts 47s, and 52s of the 462 Superseding Indictment;

DATE	NO.	PROCEEDINGS
		and as to Justin Cherif Pickel (4) - Found Guilty on Counts 1s and 70s, and Not Guilty on Counts 37s, 43s, and 73s of the 462 Superseding Indictment. (mg) (Entered: 07/25/2014)
		* * * * *
10/06/2015	2087	JUDGMENT as to Roosevelt Rico Dahda (2), Count(s) 1, 41, 42, 44, 46, 48, 51-52, 54, 55, 69, 72, Dismissed. Count(s) 1s, Defendant sentenced to 201 months imprisonment. Cts. 1 and 56: 201 months per count; Cts. 42, 45, 53, 55, and 70: 48 months per count; Cts. 43, 49, and 73: 120 months per count (all counts to run concurrently). 120 months supervised release. Cts. 1, 43, 49, 56, and 73: 10 years per count; Cts. 42, 45, 53, 55, and 70: 1 year per count (all concurrent). $1000 special assessment.; Count(s) 42s, Defendant sentenced to 201 months imprisonment. Cts. 1 and 56: 201 months per count; Cts. 42, 45, 53, 55, and 70: 48 months per count; Cts. 43, 49, and 73: 120 months per count (all counts to run concurrently). 120 months supervised release. Cts. 1, 43, 49, 56, and 73: 10 years per count; Cts. 42, 45, 53, 55, and 70: 1 year per count (all concurrent). $1000 special

DATE	NO.	PROCEEDINGS
		assessment.; Count(s) 43s, Defendant sentenced to 201 months imprisonment. Cts. 1 and 56: 201 months per count; Cts. 42, 45, 53, 55, and 70: 48 months per count; Cts. 43, 49, and 73: 120 months per count (all counts to run concurrently). 120 months supervised release. Cts. 1, 43, 49, 56, and 73: 10 years per count; Cts. 42, 45, 53, 55, and 70: 1 year per count (all concurrent). $1000 special assessment.; Count(s) 45s, Defendant sentenced to 201 months imprisonment. Cts. 1 and 56: 201 months per count; Cts. 42, 45, 53, 55, and 70: 48 months per count; Cts. 43, 49, and 73: 120 months per count (all counts to run concurrently). 120 months supervised release. Cts. 1, 43, 49, 56, and 73: 10 years per count; Cts. 42, 45, 53, 55, and 70: 1 year per count (all concurrent). $1000 special assessment.; Count(s) 47s, 52s, Defendant found not guilty.; Count(s) 49s, Defendant sentenced to 201 months imprisonment. Cts. 1 and 56: 201 months per count; Cts. 42, 45, 53, 55, and 70: 48 months per count; Cts. 43, 49, and 73: 120 months per count (all counts to run concurrently). 120 months supervised release. Cts. 1, 43, 49, 56, and 73: 10 years per count; Cts. 42, 45, 53, 55,

DATE	NO.	PROCEEDINGS
		and 70: 1 year per count (all concurrent). $1000 special assessment.; Count(s) 53s, Defendant sentenced to 201 months imprisonment. Cts. 1 and 56: 201 months per count; Cts. 42, 45, 53, 55, and 70: 48 months per count; Cts. 43, 49, and 73: 120 months per count (all counts to run concurrently). 120 months supervised release. Cts. 1, 43, 49, 56, and 73: 10 years per count; Cts. 42, 45, 53, 55, and 70: 1 year per count (all concurrent). $1000 special assessment.; Count(s) 55s, Defendant sentenced to 201 months imprisonment. Cts. 1 and 56: 201 months per count; Cts. 42, 45, 53, 55, and 70: 48 months per count; Cts. 43, 49, and 73: 120 months per count (all counts to run concurrently). 120 months supervised release. Cts. 1, 43, 49, 56, and 73: 10 years per count; Cts. 42, 45, 53, 55, and 70: 1 year per count (all concurrent). $1000 special assessment.; Count(s) 56s, Defendant sentenced to 201 months imprisonment. Cts. 1 and 56: 201 months per count; Cts. 42, 45, 53, 55, and 70: 48 months per count; Cts. 43, 49, and 73: 120 months per count (all counts to run concurrently). 120 months supervised release. Cts. 1, 43, 49, 56, and 73: 10 years per count; Cts. 42, 45, 53, 55,

DATE	NO.	PROCEEDINGS
		and 70: 1 year per count (all concurrent). $1000 special assessment.; Count(s) 70s, Defendant sentenced to 201 months imprisonment. Cts. 1 and 56: 201 months per count; Cts. 42, 45, 53, 55, and 70: 48 months per count; Cts. 43, 49, and 73: 120 months per count (all counts to run concurrently). 120 months supervised release. Cts. 1, 43, 49, 56, and 73: 10 years per count; Cts. 42, 45, 53, 55, and 70: 1 year per count (all concurrent). $1000 special assessment.; Count(s) 73s, Defendant sentenced to 201 months imprisonment. Cts. 1 and 56: 201 months per count; Cts. 42, 45, 53, 55, and 70: 48 months per count; Cts. 43, 49, and 73: 120 months per count (all counts to run concurrently). 120 months supervised release. Cts. 1, 43, 49, 56, and 73: 10 years per count; Cts. 42, 45, 53, 55, and 70: 1 year per count (all concurrent). $1000 special assessment. Signed by District Judge Kathryn H. Vratil on 10/6/15. (mm) (Entered: 10/06/2015)

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF KANSAS

Case No. 12 - 20083

UNITED STATES OF AMERICA

v.

LOS DAHDA,

Defendant.

TRANSCRIPT OF MOTION TO SUPPRESS
PROCEEDINGS BEFORE
HONORABLE JAMES P. O'HARA
ON MARCH 25 & 26, 2014

March 25, 2014

Rebecca S. Ryder, CSR, CCR, RMR
United States Court Reporter Telephone: 913 735-2334

[DIRECT EXAMINATION OF DET. MIKE MCATEE]

* * *

[23] Q. And so with those, I guess, things lacking, was there application made to United States Federal Judge Carlos Murguia for a series of wiretap authorizations on a number of targeted phones?

[24] A. Yes.

Q. Do you remember when those authorizations started, Detective McAtee?

A. I believe the first authorization started on January 4 of 2012.

Q. And with regards to the information that was supplied to the Court, did that include all of the background information that had been amassed up to that point in time?

A. Yes.

Q. Did you tell Judge Murguia about all of that information?

A. Yes.

Q. And in connection with the wiretap authorizations, tell us, if you would, walk through what individuals'

phones were targeted during the intercepted time periods and at what point that ended up stopping, not each phone, but just kind of walk us through from January forward.

A. There was a total of 11 phones, target phones, that we applied for and received authorization for from Judge Murguia. The first phones, target phone one and two, were cellular telephones utilized by Los Dahda. Then we did target phone number three, which was a cellular telephone that was initially usual by [25] Sadie Brown. Part of the investigation we learned early on that -- we went to -- target phone number two was dropped or they stopped using it right before or right after we had authorization to intercept that phone, so we went to and received information on target phone number four, which was a phone utilized a lot by Los Dahda. Then we had target phone number five, which was a cellular phone that was utilized by Roosevelt Rico Dahda. Target phone number six was a cell phone that was used by Roosevelt Rico Dahda, which we later learned in the investigation was given to Sadie Brown. Target phone number seven was a cell phone used by Phillip Alarcon in California.

Q. And how was he identified?

A. Phillip Alarcon was identified as part of this investigation initially through GPS locations that we obtained off of Los Dahda's cellular telephone when he was in California. We identified him through surveillance through agencies in California, and then after we were able to, we had court authorizations to intercept. We had officers and detectives

go out to California. Phillip Alarcon was identified out there. That's how we identified him

Q. Okay. What other phones?

A. That was seven. Eight was a cellular telephone that [26] was identified as one used by Roosevelt Rico Dahda. Cellular telephones nine and ten were target phones that were utilized by Peter Park, and then cellular telephone or target telephone number eleven was utilized by Phillip Alarcon. We received -- from January 4 -- in the span -- I believe it was June 6 or right around the first of June is when we -- all our authorizations to monitor telephones expired, and we stopped at that time.

Q. Were there a few of those phones that were extensions authorized for beyond the initial 30-day time period?

A. Yes.

Rebecca S. Ryder, CSR, CCR, RMR
United States Court Reporter Telephone: 913 735-2334

[DIRECT EXAMINATION OF DET. MIKE MCATEE]

* * *

[340] Q. (By Ms.Morehead) Detective McAtee, as we look at this chart, it says the first authorization was on January 4,2012, involving target phones one and two?

A. Yes.

Q. And that target phone two was -- there's a date of [341] 1/12 of 12. What does that denote?

A. On the first 15-day report, that is -- indicated that it was the first and final report, so that phone was stopped monitoring on the 12th and/or the ability to monitor it. So it was ended.

Q. Okay. Were there even any interceptions that occurred on that targeted phone?

A. No.

Q. And so was there any necessity for continuing that you saw as an investigator to continue on that beyond January 12 of 2012?

A. No.

Q. And there was 30 – day authorization on target phone one, which my calculation would indicate that would put that into February?

A. Yes.

Q. Yet this initial wiretap application terminated on January 20 and was resumed by a second application for target telephone one, three, and four?

A. Yes.

Q. Is that right? And so the 30-day time period would begin anew? This was in essence an extension on one, although the entire 30 days had not yet expired. Would you agree with that?

A. Yes.

[342] Q. And so again likewise as the time period was ticking away on these particular phones were there 15- and 30-day reports submitted to Judge Murguia?

A. Yes.

Q. Target telephone one, you identified that was Los Dahda?

A. Yes.

Q. What about target phone three here?

A. Target phone three was a phone that we identified belonging to Sadie Brown.

Q. It says here on 12/4/12 it was dropped?

A. Yes.

Q. What do you mean by that?

A. She stopped using it. She, being defendant Sadie Brown. As part of the investigation we learned that she obtained another phone. I believe it would have been January 17, but she continued to use this phone for about three days, four days as kind of an overlap. And then she stopped using it, so then in filing the first 15-day report was also the final, so we stopped monitoring it.

Q. So I'm just going to put this document up here, which is actually Government's Exhibit 32, which would you agree with me is in fact target phone number three?

A. Yes.

[343] Q. And so this was identified as the first and final 15-day report and indicated that we were not -- there was no necessity to continue monitoring that phone?

A. Yes.

Q. And so this idea that we were up on all these phones for this entire period of time, that's just not correct. Would you agree with that?

A. Correct.

Q. And if there was no pertinent or relevant interception or a phone was no longer being used, would you notify the Court of that and terminate making any attempts to intercept it?

A. Yes.

Q. Tell the Court, if you would, what a pertinent call is versus a non-pertinent call.

A. As part of the minimization process, and then what we were taught, a pertinent phone call would be a phone call that provided information in furtherance of the investigation, either, you know, direct criminal activity, a meeting, some of the calls that we had like on target telephone one would simply be "contact your other" or "hit me up on your other," which we deemed to be pertinent because the individual was directing at that time Los Dahda or Los Dahda would direct them to use a different phone. So that [344] could be pertinent information. Financial information of how money was being spent was deemed to be pertinent so we could identify assets and/or to try to establish how much narcotics were being distributed. So pertinent phone calls we used as a way to further the investigation or gather evidence.

Q. Okay. And so on this first and final report for target phone three do you advise the Court about the progress of the investigation along the way?

A. Yes.

Q. Do you identify, for instance, here on page 3 for each target phone in that 15-day time period or the time period within which you are reporting how many calls are intercepted, how many you determined to be pertinent or non-pertinent?

A. Yes.

Q. And then you described that within that document if there are pertinent phone calls that you will provide the Court with a daily sample of calls that were intercepted, assuming a pertinent call was received on that particular target phone during that reported period?

A. Yes.

Q. And so, for instance, here on page 4, would this be an example of that on January 21 where this pertinent [345] call or pertinent text message was referenced to the Court?

A. Yes.

Q. And then if there were no calls intercepted, like on page 6, was this a time period where it was kind of determined that there wasn't any usage at all of this phone?

A. Yes.

Q. Now, the minute it appears the phone isn't being used any more, do you immediately notify the Court that there's no longer a necessity on that phone?

A. No.

Q. Why?

A. An individual may have lost their phone; they may have turned it off; or they just may have not used it that day.

Q. Okay. And so do you give it a reasonable amount of time to see if they are going to resume using the

phone if there's an identification of discontinued use?

A. Yes.

Q. And in this case with target phone three after several days you notified, would you agree with me, Judge Murguia and discontinued -- indicated that that phone would no longer be the subject of any [346] interception, that there was no longer necessity?

A. Yes.

Q. Okay. And so as this time period is continuing on -- we talked about target phone three. What about target phone number four? Who did you identify that as being connected to?

A. Target phone number four was a cellular telephone used by Los Rovell Dahda.

Q. Okay. In this situation where you pick up target phone three and four, in order to get authorization, do you have to have a dirty call somewhere along the way that the phone is being used for illegal activity before the wiretap is even authorized?

A. Yes.

Q. And so target phone four it looks like in this time period was approximately -- one and three here was approximately a 30-day time period?

A. Yes.

Q. And if there's a situation where it's running up on a weekend or something, might you cut that short a day or two if you're going to get an extension?

A. Yes.

Q. And so the next grouping of phones that I see here are target phones one, four, and five. And so extensions were obtained for one and four at this [347] stage?

A. Yes.

Q. But target phone five was added in on that grouping?

A. Yes, it was.

Q. And who was target phone five associated with?

A. Roosevelt Dahda.

Q. And target phone four likewise in this intercepting 30-day time period, there's an indication that it was dropped?

A. Yes.

Q. So likewise, as you done previously in the 15-, 30-day report requirements, did you notify Judge Murguia of that?

A. Yes, I did.

Q. That there was no longer a necessity to intercept that phone?

A. Yes.

Q. But you would continue on with one and five?

A. Yes.

Q. And then just by way of timing it looks like there were some other phones down here. Target phone six was picked up on March 12. Who was that phone associated with?

A. Target phone six was initially associated with Roosevelt Rico Dahda, but as we began monitoring [348] about three days into the authorization, three to six days, I believe, then Sadie Brown began using that cellular phone.

Q. We saw up here on target phone three that it was initially believed to be Sadie Brown?

A. Yes.

Q. But was dropped.

A. Yes.

Q. And then target phone four was dropped, which was being utilized by Roosevelt Dahda?

A. Los Dahda.

Q. Los Dahda, sorry. And then there was this switching of users on target phone five – or, I'm sorry, target phone six between Roosevelt Dahda and Sadie Brown?

A. Yes.

Q. Based upon your training, knowledge, and experience is that sort of activity uncommon in drug traffic activity?

A. No.

Q. Why?

A. What we learned through this investigation and through training, sometimes people will pass different phones off because customers have those phones, and then also large drug trafficking [349] organizations or groups, the way I like to look at this, or any other drug trafficking group, it's a business, and the ability to have Sadie Brown, who was working for Los Dahda and Roosevelt Dahda, to contact customers, he provided her a cellular telephone where he could service his customers.

Q. Okay. And so target phone six was picked up. What about target phone seven?

A. Target phone seven -- and I see that I left the two off of that. I apologize.

Q. I added it for you.

A. Thank you. Target phone seven was a cellular telephone used by Phillip Alarcon.

Q. Okay. And at some point target phones one and five expired?

A. Yes.

Q. That was April 21, 2012?

A. Yes.

Q. And that was -- target phone one was a phone of Los Dahda?

A. Yes.

Q. And target phone five was the phone that was associated with?

A. Roosevelt Dahda.

Q. Okay. And why were the phones stopped at that [350] juncture?

A. We believed the necessity had run out for monitoring those phones. As we progressed through the investigation, we had learned that Los Dahda's cellular phone, TT1, Roosevelt Dahda's cellular phone, TT5, were cellular phones that – I think I characterized them as an anchor phone, that they had that number for long periods of time, but they also obtained prepaid phones, which were cellular phone TT2, TT4, TT6, TT8 and phones of that nature that weren't specifically through a service provider that you would have to provide information to. What we learned through the investigation, that the dirty phone calls or more evidentiary phone calls in the furtherance of the investigation, those conversations were occurring on the phones that weren't in their names or subscribed to them.

Q. And then in April there was the addition of target phone eight and nine and ten, and what were those – who were those phones associated with?

A. TT8, or target phone eight, was a phone utilized by Roosevelt Rico Dahda. Target phone nine and target phone ten were cellular telephones utilized by Peter Park.

Q. What about target phone 11, the last one?

[351] A. Target telephone 11 was utilized by Phillip Alarcon.

Q. And as this – as phones were being added or subtracted, did this prove to be a pretty labor-intensive investigation?

A. Yes.

Q. And each of these wiretap authorizations of each of these target telephones, were they in fact signed by Judge Murguia?

A. Yes.

Q. And for the record, Judge Murguia is a United States District Court Judge with the District of Kansas?

A. Yes.

Q. Which has the jurisdictional boundaries of the state of Kansas. Are you aware of that?

A. Yes.

Q. And in connection with the authorizations that you obtained, were you involved in the monitoring of the intercepted phone calls?

A. Yes.

Q. And tell the Court where those interceptions occurred at?

A. The interceptions that occurred were at the DEA headquarters in Overland Park, Kansas.

Q. Okay. And again that is in the District of Kansas?

A. Yes.

[352] Q. And is that then -- was that then designated as the listening post for this investigation?

A. Yes.

Q. And the phone calls that come in, the officers that were monitoring them, were they physically at that location?

A. Yes.

Q. And were there any of the phones that -- did the listening post in Overland Park, Kansas, did it remain constant throughout this investigationconcerning all of these targeted phones?

A. All but one.

Q. And I want to talk about that one, but the listening post itself, did it have the ability to listen to allof these targeted telephones?

A. Yes, it did.

Q. And the way that DEA is comprised in these investigations, is it your understanding there's typically a primary listening post?

A. Yes.

Q. And was there in fact, though, on one of the targeted telephones a secondary listening post utilized?

A. Yes.

Q. And which target phone was that?

A. Target telephone seven.

[353] Q. And what was that -- where was that secondary listening post?

A. The secondary listening post was in St. Louis, Missouri.

Q. And what target phone was that on?

A. Target telephone seven, utilized by Phillip Alarcon.

Q. And why was -- and was that at DEA headquarters in St. Louis?

A. Yes.

Q. Did you actually have occasion to be there and visit that location?

A. Yes, I did.

Q. And what was the reason that target phone seven was given a secondary listening post?

A. Based upon Phillip Alarcon's belief – there was a belief that he may be a Spanish speaker and that the translators that DEA utilizes are headquartered there in St. Louis. The decision was made to have it monitored, it being TT7, in St. Louis to monitor that phone so the translations could be done there.

Q. And did you know where Phillip Alarcon was located physically?

A. Yes.

Q. Where was that?

A. California.

[354] Q. And despite the fact that the secondary listening post in St. Louis was utilized, was there still a listening post in the District of Kansas?

A. Yes.

Q. And at any point in time could law enforcement in Kansas listen to Phillip Alarcon's phone calls that were occurring simultaneous to the listening post at DEA in St. Louis?

A. Yes.

Q. And as his phone calls began being intercepted, were there in fact any Spanish-speaking conversations that were intercepted?

A. No, I do not believe so.

Q. With regards to that target phone number seven, because I think you said telephone 11 was also Phillip Alarcon's?

A. Correct.

Q. Was the primary listening post in Kansas utilized specifically not only for target phone 11 but all the other target telephones as well?

A. Yes.

March 26, 2014

Rebecca S. Ryder, CSR, CCR, RMR
United States Court Reporter Telephone: 913 735-2334

[CROSS EXAMINATION OF DET. MIKE MCATEE]

* * *

[449] Q. When you intercept a phone call -- you received an order that authorized you to conduct an intercept?

A. Yes.

Q. And you understood that the act of intercepting a phone call occurs where the person is with their phone that you're listening to, right, or did you not go over this when you did it?

[450] A. I don't understand the question, what you're trying to say. I guess -- go ahead. I'll do my best.

Q. You were authorized under the orders to conduct -- if the phones were to leave the District of Kansas, the interception's outside of the district?

A. Yes.

Q. And you understood at that point that the intercept means you're intercepting at your listening room; right?

A. Correct.

Q. And you're also intercepting where the person is, using their phone, because they are making the communication right there; right?

A. No. I believe you're intercepting I'm receiving the information from the wire room or the room that -- or listening post.

Q. Okay. Because the order said that if the phones-leave the jurisdiction that you can intercept outside of the District of Kansas, you were authorized to move your listening room outside the state?

A. I don't know if we were authorized to do it. We were able to listen to target phones if they left or target phones that were in the state of Kansas. And someone outside the state of Kansas was calling them, I just know that we were monitoring them in Overland [451] Park, Kansas.

Q. And there were no limitations as to where you placed that listening room?

A. I believe the limitation has to be within the District of the State of Kansas because it's an investigation being done by DEA here in Kansas -- that that's why we were listening here -- and then the judge who authorized the monitoring, Judge Murguia, has responsibilities for the State of Kansas.

Q. But you listened to target telephone seven in St. Louis?

A. Target telephone seven, there was the ability to listen to it in St. Louis and in Kansas.

Q. Well, there is an ability to listen to it anywhere in the country at a DEA headquarters, isn't there?

A. I don't believe so.

Q. Can't you route these calls to anywhere you ask the router to route it to?

A. That would be a DEA question. I don't know.

Q. Nonetheless, the listening to target telephone seven occurred in St. Louis?

A. It was monitored by speakers in St. Louis.

Rebecca S. Ryder, CSR, CCR, RMR
United States Court Reporter Telephone: 913 735-2334

[501] MR. JOHNSON: Thank you, Judge. I want to take up the first motion, which is the legal one. When we look at the statute, we know that there's a limitation on the courts and where they can -- and the statute is pretty clear on the territorial limitations of the Court. The Court cannot issue an order authorizing interception out of the District of Kansas except in the case of a mobile interception device. And in this case in each one of the orders the Court authorized interception outside of the District of Kansas. That is absolutely clear on its face that the order permits that. In fact, because of that, one of the intercepts, target telephone seven, occurred exclusively outside the District of Kansas. I think when we look at the wiretaps where the listening room was in Kansas, the government has confused our motion. There are multiple grounds for relief under Title III, avenues for relief: that the government violated the order in conducting the intercept, that the interceptions were unlawful, or [502] that the order was insufficient on its the face.

Regarding all but target telephone seven, our motion is that the orders themselves were insufficient on their face even if the government conducted the intercepts from the District of Kansas. I'll make the additional motion now, Judge, and I'll make it orally regarding target telephone seven, that not only was the

intercept on target telephone seven conducted pursuant to an insufficient order, but it was also unlawful because it occurred entirely outside the District of Kansas. So there would be a second reason for relief on target telephone seven because of the unlawfulness of it occurring outside the jurisdiction.

THE COURT: Again, target telephone seven is essentially moot, since the government concedes it's not going to use any of the evidence.

MR. JOHNSON: The issue is moot. The reason I'm bringing it up is to illustrate the point that the orders were authorizing the DEA to move this operation around the country. There were no constraints that limited it to the state of Kansas. Because the order exceeded the statutory authority of the judge and is insufficient on its face, the rule under Title III is clear that all the evidence needs [503] to be suppressed.

THE COURT: Well, I understand your argument in terms of construction of the language within the four corners of the statute.

MR. JOHNSON: Yes, sir.

THE COURT: Query?

MR. JOHNSON: Yes, sir.

THE COURT: Has any circuit court of appeals held that your construction of the statute as applied to the facts here is correct?

MR. JOHNSON: Almost.

THE COURT: Okay. Which one would that be?

MR. JOHNSON: That would be the Fifth Circuit. And I cited it in our motion. If you asked me that last September, I would say yes, because the Fifth Circuit had entered the ruling that our interpretation of the statute was correct. The Fifth Circuit then withdrew their opinion on its own motion and reissued it. There were two grounds for relief for the defendant in that case, and the Court went ahead and granted that defendant relief under Title III for a failure to minimize a phone call and then relegated the discussion regarding territorial jurisdiction to a concurrence. Within that concurrence, Judge, if you read it, Judge DeMoss [504] writes -- I don't quote exactly.

THE COURT: In the concurring opinion.

MR. JOHNSON: In the concurring opinion.

THE COURT: In the unpublished opinion.

MR. JOHNSON: It was published originally and when they withdrew it -- I think it was --

THE COURT: Okay. Go ahead.

MR. JOHNSON: He says, I don't care if there is a split in the circuits. I would publish it. I would make this part of our opinion in chief. The Tenth Circuit has never addressed the issue. I think that ultimately there's been very, very little litigation on the issue. You're not going to find a lot out there. The Seventh Circuit has dealt with the issue. I cited that case as well.

THE COURT: The Seventh but not the Second; correct?

MR. JOHNSON: The Seventh Circuit. It's Judge Posner the Seventh Circuit. And I think that Judge Posner's opinion was wrongly decided. I think if we follow the logic of it it does not follow our rules of statutory construction. I think that the Seventh Circuit took a leap. I think if this Court is to make a decision on it, assuming how the Tenth Circuit might rule on that issue if it were to get up [505] to it, I don't think the Tenth Circuit would follow the Seventh. It's illogical. And especially given the interpretation that the Fifth Circuit almost gave -- I know it doesn't have the authority of law, the Fifth Circuit, but it certainly provides guidance for this Court and --

THE COURT: Is there anything in Tenth Circuit precedent that makes you believe that if confronted with this issue -- and I suspect some day it will be -- that the Tenth would be more likely to follow the Fifth than the Seventh?

MR. JOHNSON: Not one way or the other, other than the proximate time of the Fifth Circuit opinion being just last year, and that the Seventh Circuit opinion is somewhat old. But other than that I would not have -- I would not know one way or another how that would come out.

THE COURT: How have district courts dealt with this issue post-Fifth Circuit?

MR. JOHNSON: I don't know. I haven't found anything on it. If you have, you're a better researcher than I am.

THE COURT: Well, somebody in my office may be but . . .

MR. JOHNSON: Send them my way. I don't [506] know, Judge. I really don't know how district courts have dealt with it. I don't know if anyone has raised it before a district court yet. The Fifth Circuit opinion, the original one, was only issued in I think August 2012, so the opportunity – this is a two-year process for us to get here today, so the opportunity for litigation based upon the Fifth Circuit is – has not really run full circle yet, I think, for cases that have been pending.

THE COURT: Given that, save target telephone seven, which is essentially moot, all of the interceptions were actually conducted in Kansas.

MR. JOHNSON: Uh-huh.

THE COURT: You still feel that the Court should strike down these wiretap orders as invalid on their face?

MR. JOHNSON: Yes.

THE COURT: Because they permitted interception outside of Kansas?

MR. JOHNSON: Absolutely.

THE COURT: Why?

MR. JOHNSON: For the very reason that the Court orders needed to prevent what happened in this case, which is that the statute says the courts need to maintain close scrutiny and keep the [507] investigations within its jurisdiction. That's the statutory purpose of it. It needs to constrain those investigations to

its jurisdiction, and if it does not do so, it gives investigators the freedom to leave, which is exactly what happened in this case, and it resulted in an unlawful wiretap because the Court order permitted an unlawful wiretap. And so the reason why you would invalidate it, suppress the wiretaps because the order is insufficient on its face, is for that very reason, because the government was not constrained by order and was free to do things that violated the statute because it was permitted by court order.

THE COURT: How, if at all, was your client hurt by that?

MR. JOHNSON: Well, I don't think that we need to show prejudice. Prejudice is not an element under the statute. We don't need to show that there was any prejudice to it. But if there was the potential for prejudice, it would have been if Judge Murguia had, during target telephone seven, had concerns in his overrsight of it, it was no longer down the street, it was across in another state. But prejudice is not a requisite showing. It's not an element of it. Once we have shown that the order is [508] insufficient on its face and that the order regards an element of the statute that is one of the substantive core concerns of Congress, the Court doesn't need to find any prejudice; it doesn't even need to find that the operation was otherwise lawful. There are three avenues for relief. This court has to suppress if it finds that the order was insufficient on its face and that insufficiency was related to one of the substantive concerns of Congress. I would relate to the Court that it was one of the substantive concerns of Congress. If you look at -- it's not a -- it would be under 2518, subsection 12. And what this is dealing with is an issue that is not at issue in our case, but I'm

bringing it up to show the intent of Congress and why this is one of its substantive concerns. What these provisions are dealing with, subsection 11 and subsection 12, are the applications -- or applications for a wiretap when the location of the tap facilities are not yet known. And what subsection 12 says is you're not allowed to start the tap until you know where it's all going to be, even if you -- even if it's impractical at the time of the application, until you know where it is, you can't start. So it's obviously a concern of Congress that [509] the location that the operation takes place in is going to be important. And the only other place within the statute that the location shows its importance, according to Congress, is in the jurisdiction of the court. It's obviously something that they wish to limit the ability of the judge, of a judge, of a court, to enter of orders in this case. And if it substantively limits the ability of a court to issue a wiretap order, then that is in fact what -- that is the threshold –

THE COURT: Well, Mr. Johnson, is it defendant Los Dahda's position that the intrastate limitation on the wiretap would apply not only to the listening post but also the location of the phones, or just the former?

MR. JOHNSON: It depends upon – ultimately I think in practice it would make most sense just to say that one or the other needs to be within the district, because that's the definition of interception. So the interception has to take place within the district.

THE COURT: Your questions of Detective McAtee this afternoon seemed to be trying to establish that interception was occurring technologically illegally not only at the listening [510] post but also at the point of the telephone; true?

MR. JOHNSON: And that's the law.

THE COURT: If that's the law, under your construction of this staute, wouldn't that mean that a wiretap issued by a federal judge in Kansas would be ineffective to surveil a cell phone that travels 2 miles across the Missouri river into the Western District of Missouri?

MR. JOHNSON: Not if the listening post was ordered to remain in the state of Kansas. That's the way that that – and it's a simple thing.

THE COURT: Right. But even if the listening post is in Kansas, under your view, if the interception occurs at the point of the phone as well and if the phone travels from someone's residence in Lawrence to Kansas City, Missouri, wouldn't that also invalidate the tap?

MR. JOHNSON: No. If the order had a proper jurisdictional limitation and one foot stayed in the state and the phone left, that would be proper. But that's not what we have here. What we have here is that the order is insufficient on its face because it doesn't have those territorial limitations.

THE COURT: Maybe I am losing where you're [511] going. How would this wiretap order have been written properly in your view, assuming that law enforcement were able to lay an appropriate foundation for the need for the wiretap based on exhaustion of other investigative tools?

MR. JOHNSON: I think one of two ways, one of which is practical and the other impractical. The impractical way is to say that the interceptions must end

if the phones leave the jurisdiction, the listening room is out the jurisdiction, which would require investigators to maintain probably GPS pings and whatnot. It would be very difficult to track the target phone.

THE COURT: It would make the tapped phone useless, wouldn't it?

MR. JOHNSON: No. Because the alternate way of doing it is to simply order the listening post to remain within the territorial jurisdiction of the Court. And that's easy. That's completely practical. And it insures that the listening agency remains nearby the Court, and for the reasons that we cited in our motion why that would be a primary concern.

THE COURT: Under your view of the statute, so long as the wiretap order required the listening [512] post to remain in the physical confines of the issuing state, it would be permissible under that order to tap the phones wherever those phones physically traveled in the United States?

MR. JOHNSON: Yes, that would. But there would have to be the proper territorial limitations. Likewise if the tap was -- say it was a physical tap at a house inside a room or a physical tap on a land line; then and that was presented by the government in an application, we're going to tap that fixed location, then there would be no need for -- to require the government to maintain a listening post in the jurisdiction because the other prong of jurisdiction, where the tap is and where the listening post is, in this case the tap would be within the jurisdiction and it would be guaranteed within the jurisdiction because it's fixed, it's

not a mobile phone. In the case of mobile phones it becomes more complex.

THE COURT: What is the proper territorial jurisdiction limitation on the mobile phone, putting aside the listening post or assuming that the listening post is in the same state where the judge issues the tap?

MR. JOHNSON: It can go anywhere as long as [513] the listening room remains in the jurisdiction, or the listening room can go anywhere as long as the tap remains in the jurisdiction[.] Does that make sense? It's federal law, so it probably doesn't.

THE COURT: Well, it would be imprudent for me to respond to that question.

MR. JOHNSON: Your Honor, I think that you're asking important questions. This statute was written in 1967, maybe, something like that. We're 30 years out from cell phones at the time this was written. I don't know if Congress has ever made amendments to it, but they haven't, and this is the law, and this is what it says -- the statute says the Court is required to do if there are -- if the Court has authorized interceptions outside of its territorial jurisdiction.

THE COURT: Okay. I just want to make sure I'm understanding your position. I'm not agreeing or disagreeing with it right now, but I want to understand where you're going on this.

MR. JOHNSON: Yeah. It's tough to make heads or tails sometimes with this, but I think that nonetheless there had to have been in the orders a territorial restriction on the government, and absent that it becomes insufficient on its face, and this [514] Court is

required by law under the statute, if that happens, to suppress.

THE COURT: Let me ask you another question. We're some distance away from this, but away from this, but would there be any constitutional impediment from your standpoint of Congress modifying the statute so that the listening post could be in Overland Park, Kansas, if that were convenient, or in Kansas City, Missouri, if that were more convenient?

MR. JOHNSON: I don't think there would be a Fourth Amendment limitation on that if it was a federal judge. I think you might have jurisdictional questions if it was a state court judge authorizing taps in Nebraska or something like that, but probably not a Fourth Amendment issue, which is what -- I think what we would be getting at, yes, Congress could make changes, but they haven't.

THE COURT: I appreciate your clarification. Did you have anything else on the first motion?

MR. JOHNSON: No, Judge.

Rebecca S. Ryder, CSR, CCR, RMR
United States Court Reporter Telephone: 913 735-2334

[529] THE COURT: Okay. Thank you. Ms. Morehead, do you wish to argue the motions?

MS. MOREHEAD: I do, Judge. Can you give me just one -- I was trying to get exhibit numbers down here. I think I can be fairly quick.

First of all, Judge, the first motion argues that the orders are facially invalid, and those are Exhibits 3, 6, 9, 12, 15, 18, 21, 24, 27, and 30; and the argument lodged by Mr. Johnson is that the orders are facially invalid because they did not limit the government to the confines of the territorial jurisdiction within our district where Judge Murguia was assigned. That is incorrect. If you look at the orders, each and every one of these orders references -- and I just have highlighted Government's Exhibit 3 to start with, but the same language is fashioned in every single order where Judge Murguia specifically said pursuant to Title 18 U.S.C. Section 2518(3). That is precisely the statutory authority, which Mr. Johnson complains [530] Judge Murguia did not restrict the government. Judge Murguia did. Judge Murguia indicated, I expect you to follow the statute, this statute, and the restrictions that it imposes in the implementation of the wiretap. There's no requirement, based upon any case that Mr. Johnson has cited, that any magic language or special language has to be included. But Judge

Murguia did reference specifically the statutory authority under which we were governed. It did not give us a free-for-all to set up a listening post anywhere at all that we wanted to.

THE COURT: Is it correct though that none of these orders state that the listening post must be in Kansas?

MS. MOREHEAD: Well, it references 2518(3).

THE COURT: You're talking about page 4 of Exhibit 3?

MS. MOREHEAD: Yes, which tells us the territorial restrictions. If you read the statute, the statute doesn't say that the listening post has to be in this district; the statute doesn't say anything like that. That is an interpretation that has now evolved as a result of the initial North decision that Mr. Johnson wishes he could cite to the Court but that which does not now exist. As a [531] result of that, it's come to the attention of courts, of government officials about those specific restrictions. Again, like you mentioned, there's nothing to indicate exactly what will happen.

I argue, Judge, first of all, there were restrictions placed and, No. 2, even though there was no specific language that indicated that, that didn't occur in this case as it applies to the phones, aside from target phone seven, which the government is not presenting any evidence on. We're not, again, as you indicate, and as we indicated in our motion, not conceding any legality issues as it arises on that phone. But for the evidence that we will rely upon in evidence in this case, this is a nonissue, it truly is. The listening posts were

here in Kansas. Whether they could have been listened to somewhere else is irrelevant if it didn't happen, and also because Judge Murguia specifically limited us in this case by the language that he implemented in each and every order that was fashioned in this case. So that would be my response on the first motion.

THE COURT: Ms. Morehead, is it the government's position that under the language that you cite on page 4 of Exhibit 3, and evidently appears in all of the subsequent orders, that [532] provided the target phone was transported outside of Kansas there would be no legal impediment to the listening post being conducted, or maintained, I should say, in a state other than Kansas?

MS. MOREHEAD: Well, I don't know because that was never contemplated in this case.

THE COURT: What I'm referring to is the language –

MS. MOREHEAD: It didn't occur.

THE COURT: I know it didn't occur, but the language that I think you're referring to says, "Pursuant to Title 18 U.S.C. Section 2518(3), it is further ordered that in the event that target telephone one and target telephone two are transmitted outside of the territorial jurisdiction of the Court, interception may take place in any other jurisdiction within the United States, end of quote.

MS. MOREHEAD: And I'm taking that – and the way we have always interpreted that is if the phone goes somewhere else, we still get to listen to that

phone, not we're going to pick up the listening post and move it hither and yon. I have never seen that happen. I have never known of that happening.

THE COURT: I guess my question is, would [533] there be any statutory impediment to moving the listening post and conducting the interception outside of Kansas in your view?

MS. MOREHEAD: As long as the listening post was where the phone was when it was being intercepted, or one of the calls. So let's say, arguably, I guess, if the phone was transported to California and this order were in place, arguably the listening post could also be in California because the phone is there. I don't know because I have honestly never done research about moving a listening post in the middle of an investigation. I have never known of that occurring. I really think that would be impractical to accomplish because of the logistical parameters around that, just the manpower. There aren't listening posts everywhere that we can just establish easily.

THE COURT: Are you aware of any cases beyond the Fifth Circuit and Seventh Circuit cases that I was visiting with Mr. Johnson about that speak to this issue?

MS. MOREHEAD: Not directly. I mean, there have been other issues that have came up about matters contained in an order, you know, erroneous language and the like, but I don't think anything [534] directly related to where the listening post is or where the listening of the calls occur.

THE COURT: Okay.

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

[Filed 10/05/15]

Case Number: 2:12CR20083 - 001

UNITED STATES OF AMERICA

v.

LOS ROVELL DAHDA

JUDGMENT IN A CRIMINAL CASE

USM Number: 10900-031

Defendant's Attorney: Richard W. Johnson

THE DEFENDANT:

☐ pleaded guilty to count(s):

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☒ was found guilty on count(s) 1, 26, 31, 36, 38, 39, 41, 42, 43, 45, 46, 49, 73, 85, and 88 of the Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count

See Next Page

The defendant is sentenced as provided in pages 1 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 3, 23, 30, 32, 34, 37 and 48 of the Superseding Indictment.

☒ All other charging documents, under this case number as such pertain to this defendant are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of material changes in economic circumstances.

09/13/2015
Date of Imposition of Judgment

s/ Kathryn H. Vratil
Signature of Judge

Honorable Kathryn H. Vratil, U.S. District Judge
Name & Title of Judge

10/5/15
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 841(a)(1), (b)(1)(A)(ii), (b)(1)(A)(vii), 846 and 856	Conspiracy to Possess With Intent to Distribute and to Distribute Five Kilograms or More of Cocaine, to Manufacture, to	07/30/2012	1

	Possess With Intent to Distribute and to Distribute 1,000 Kilograms or More of Marijuana, and Maintaining Drug-Involved Premises, a Class A felony		
21 U.S.C. §§ 841(a)(1), (b)(1)(D) and 18 U.S.C. § 2	Distribution of Marijuana, a Class D felony	11/11/2011 01/06/2012	26 36
21 U.S.C. § 856(a)(1) and (a)(2) and 18 U.S.C. § 2	Maintaining a Drug-Involved Premises, a Class C felony	11/16/2011	31
21 U.S.C. § 843(b)	Use of a Communication Facility to Facilitate a Drug Trafficking Offense, a Class E felony	01/19/2012 01/24/2012 01/28/2012 01/29/2012 02/02/2012 02/02/2012	38 39 41 42 45 46
21 U.S.C. §§ 841(a)(1), (b)(1)(D) and 18 U.S.C. § 2	Possession With Intent to Distribute Marijuana, a Class D felony	02/13/2012 02/21/2012 05/17/2012	43 49 85
21 U.S.C. §§ 841(a)(1), (b)(1)(D),	Attempted Possession With Intent to Distribute	04/26/2012 05/22/2012	73 88

846 and 18 U.S.C. § 2	Marijuana, a Class D felony		

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 189 months.

This term of imprisonment consists of 189 months on each Counts 1 and 31; 60 months on each of Counts 26, 36, 43, 49, 73, 85 and 88; and 48 months on each of Counts 38, 39, 41, 42, 45 and 46, all counts to be served concurrently

☒ The Court makes the following recommendations to the Bureau of Prisons: That the defendant be considered for placement in the Western Region, and that he be considered for participation in an advanced occupational education program.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district.

☐ at __ on __

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before __ on __

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 10 years.

This term of supervised release consists of 10 years on each of Counts 1, 26, 36, 43, 49, 73, 85 and 88; 3 years on Count 31; and 1 year on each of Counts 38, 39, 41, 42, 45 and 46, all counts to be served concurrently

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check if applicable)*

☒ The defendant is prohibited from possessing or purchasing a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check if applicable)*

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check if applicable)*

☐ The defendant shall register as a sex offender, and keep the registration current, in each jurisdiction where the defendant resides, where the defendant is an employee, and where the defendant is a student. For initial registration purposes only, the defendant shall also register in the jurisdiction in which convicted, if such jurisdiction is different from the jurisdiction of residence. Registration shall occur not later than 3 business days after being sentenced, if the defendant is not sentenced to a term of imprisonment. The defendant shall, not later than 3 business days after each change in name, residence, employment, or student status, appear in person in at least one jurisdiction in which the defendant is registered and inform that jurisdiction of all changes in the information required. *(Check if applicable)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check if applicable)*

If this judgment imposes a fine or restitution, it is to be a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer in a manner and frequency directed by the court or the probation officer;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substances or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant is prohibited from possessing or purchasing a firearm, ammunition, destructive device, or other dangerous weapon.

2. The defendant shall submit his/her person, house, residence, vehicle(s), papers, business or place of employment and any property under the defendant's control to a search, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the total criminal monetary penalties under the Schedule of Payments set forth in this Judgment.

	Assessment	Fine	Restitution
Totals:	$1,500	$16,985,250.00	None

☐ The determination of restitution is deferred until ___. *An Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals:	$	$	

☐ Restitution amount ordered pursuant to plea agreement $___ .

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A and 113A of Title for offenses committed on or after September 13, 1994, but before April 23, 1996.

☒ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options set forth in this Judgment may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ❑ fine and/or ❑ restitution.

☐ the interest requirement for the ❑ fine and/or ❑ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $__ due immediately, balance due

☐ not later than ___, or

☐ in accordance with ❑ C, ❑ D, ❑ E, or ❑ F below; or

B ☒ Payment to begin immediately (may be combined with ❑ C, ❑ D, or ☒ F below); or

C ☐ Payment in monthly installments of not less than 5% of the defendant's monthly gross household income over a period of ____ years to commence ____ days after the date of this judgment; or

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount Joint and Several Amount and corresponding payee, if appropriate.

Case Number (Including Defendant Number)	Defendant Name	Joint and Several Amount

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States. Payments against any money judgment ordered as part of a forfeiture order should be made payable to the United States of America, c/o United States Attorney, Attn: Asset Forfeiture Unit, 1200 Epic Center, 301 N. Main, Wichita, Kansas 67202.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

[Filed 11/13/15]

Case Number: 2:12CR20083 - 002

UNITED STATES OF AMERICA

v.

ROOSEVELT RICO DAHDA

AMENDED JUDGMENT IN A CRIMINAL CASE

USM Number: 10899-031

Defendant's Attorney: Mark L. Bennett Jr. and Roger Gordon Luedke

Date of Original Judgment: 10/06/2015
(Or Date of Last Amended Judgment)

Reason for Amendment:

[ ] Correction of Sentence on Remand (18 U.S.C 3742(f)(1) and (2))

[ ] Reduction of Sentence for Changed Circumstances (Fed. R.Crim.P.35(b))

[ ] Correction of Sentence by Sentencing Court (Fed. R.Crim.P.35(a)

[X] Correction of Sentence for Clerical Mistake (Fed. R.Crim.P.36)

[ ] Modification of Supervision Conditions (18 U.S.C § 3563(c) or 3583(e))

[ ] Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons 18 U.S.C. §3582(c)(1))

[ ] Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

[ ] Direct Motion to District Court Pursuant to

[ ] 28 U.S.C. § 2255, or

[ ] 18 U.S.C. § 3559(c)(7)

[ ] Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

☐ pleaded guilty to count(s): ____.

☐ pleaded nolo contendere to count(s) ____ which was accepted by the court.

☒ was found guilty on count(s) 1, 42, 43, 45, 49, 53, 55, 56, 70, 73 of the Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count

See Next Page

The defendant is sentenced as provided in pages 1 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 47, 52 of the Superseding Indictment.

☐ Count(s) ____ is dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of material changes in economic circumstances.

*11/13/15
Date of Imposition of Judgment

s/ Kathryn H. Vratil
Signature of Judge

Honorable Kathryn H. Vratil, U.S. District Judge
Name & Title of Judge

November 13, 2015
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
*21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846	Conspiracy to Possess With Intent to Distribute and to Distribute Five Kilograms or More of Cocaine, to Manufacture, to Possess With Intent to Distribute and to Distribute 1,000 Kilograms or More of Marijuana; and	07/30/2012	1

	Maintaining Drug-Involved Premises, a Class C felony		
21 U.S.C. § 843(b)	Use of a Communication Facility to Facilitate a Drug Trafficking Offense, a Class E felony	01/29/2012 02/02/2012 03/16/2012 03/18/2012 04/24/2012	42 45 53 55 70
21 U.S.C. §§ 841(a)(1), and 841 (b)(1)(D)	Possession With Intent to Distribute Marijuana, a Class D felony	02/13/2012 02/21/2012	43 49
21 U.S.C. §§ 841(a)(1), 841(b)(1)(D), and 860(a)	Possession With Intent to Distribute and Distributed Marijuana Within 1,000 feet of a Playground, a Class D felony	03/18/2012	56
21 U.S.C. §§ 841(a)(1), 841(b)(1)(D) and 846	Attempted Possession With Intent to Distribute Marijuana, a Class D felony	04/26/2012	73

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 201 months.

Cts. 1 and 56: 201 months per count; Cts. 42, 45, 53, 55, and 70: 48 months per count; Cts. 43, 49, and 73: 120

months per count (all counts to run concurrently).

☒ *The Court makes the following recommendations to the Bureau of Prisons: Placement in Victorville, California, or any other detention facility in the Western Region of the BOP, that offers advanced occupational education programs.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district.

- ☐ at ___ on ___.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before ___ on ___.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 10 years.

Cts. 1, 43, 49, 56, and 73: 10 years per count; Cts. 42, 45, 53, 55, and 70: 1 year per count (all concurrent)

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check if applicable)*

☒ The defendant is prohibited from possessing or purchasing a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check if applicable)*

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check if applicable)*

☐ The defendant shall register as a sex offender, and keep the registration current, in each jurisdiction where the defendant resides, where the defendant

is an employee, and where the defendant is a student. For initial registration purposes only, the defendant shall also register in the jurisdiction in which convicted, if such jurisdiction is different from the jurisdiction of residence. Registration shall occur not later than 3 business days after being sentenced, if the defendant is not sentenced to a term of imprisonment. The defendant shall, not later than 3 business days after each change in name, residence, employment, or student status, appear in person in at least one jurisdiction in which the defendant is registered and inform that jurisdiction of all changes in the information required. *(Check if applicable)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check if applicable)*

If this judgment imposes a fine or restitution, it is to be a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

14) the defendant shall not leave the judicial district without permission of the court or probation officer;

15) the defendant shall report to the probation officer in a manner and frequency directed by the court or the probation officer;

16) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;

17) the defendant shall support his or her dependents and meet other family responsibilities;

18) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

19) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

20) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substances or any paraphernalia related to any controlled substances, except as prescribed by a physician;

21) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

22) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

23) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

24) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

25) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

26) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned

CRIMINAL MONETARY PENALTIES

The defendant shall pay the total criminal monetary penalties under the Schedule of Payments set forth in this Judgment.

	Assessment	Fine	Restitution
Totals:	$1,000	Waive	None

☐ The determination of restitution is deferred until ___. *An Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals:	$	$	

☐ Restitution amount ordered pursuant to plea agreement $ ___ .

☐ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A and 113A of Title for offenses committed on or after September 13, 1994, but before April 23, 1996.

the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options set forth in this Judgment may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ❑ fine and/or ❑ restitution.

☐ the interest requirement for the ❑ fine and/or ❑ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ due immediately, balance due

☐ not later than ___, or

☐ in accordance with ❑ C, ❑ D, ❑ E, or ❑ F below; or

B ☒ Payment to begin immediately (may be combined with ❑ C, ❑ D, or ☒ F below); or

C ☐ Payment in monthly installments of not less than 5% of the defendant's monthly gross household income over a period of ____ years to commence ____ days after the date of this judgment; or

D ☐ Payment of not less than 10% of the funds deposited each month into the inmate's trust fund account and monthly installments of not less than

5% of the defendant's monthly gross household income over a period of ___ years, to commence ___ days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within ___ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

If restitution is ordered, the Clerk, U.S. District Court, may hold and accumulate restitution payments, without distribution, until the amount accumulated is such that the minimum distribution to any restitution victim will not be less than $25.

Payments should be made to Clerk, U.S. District Court, U.S. Courthouse - Room 259, 500 State Avenue, Kansas City, Kansas 66101.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount Joint and

Several Amount and corresponding payee, if appropriate.

Case Number (Including Defendant Number)	Defendant Name	Joint and Several Amount

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The Preliminary Order of Forfeiture is hereby made final as to this defendant and the defendant shall forfeit the defendant's interest in said property to the United States. Payments against any money judgement ordered as part of a forfeiture order should be made payable to the United States of America, c/o United States Attorney, Attn: Asset Forfeiture Unit, 1200 Epic Center, 301 N. Main, Wichita, Kansas 67202.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

No. 17-43

In the Supreme Court of the United States

LOS ROVELL DAHDA AND ROOSEVELT RICO DAHDA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

RICK E. BAILEY
CONLEE, SCHMIDT
& EMERSON, LLP
200 West Douglas Avenue,
Suite 300
Wichita, KS 67202

EDWARD K. FEHLIG, JR.
FEHLIG & FEHLIG-TATUM,
LLC
3002 South Jefferson
Avenue, Suite 207
St. Louis, MO 63118

KANNON K. SHANMUGAM
Counsel of Record
AMY MASON SAHARIA
ALLISON JONES RUSHING
CHARLES L. MCCLOUD
J. LIAT ROME
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

QUESTION PRESENTED

Whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, requires the suppression of evidence obtained pursuant to a wiretap order that is facially insufficient because the order exceeds the judge's territorial jurisdiction.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statutory provisions involved 2
Statement 3
A. Background 4
B. Facts and procedural history 8
Summary of argument 14
Argument 17
I. Title III requires the suppression of evidence obtained pursuant to a facially insufficient wiretap order 17
A. The plain text of Section 2518(10)(a)(ii) unambiguously requires suppression 17
B. The court of appeals' contrary interpretation of Section 2518(10)(a)(ii) is deeply flawed 25
II. Even if Title III imposed a 'core concerns' test, suppression would still be required where an order exceeds the judge's territorial jurisdiction 33
Conclusion 41

TABLE OF AUTHORITIES

Cases:

Adams v. *Lankford*, 788 F.2d 1493 (11th Cir. 1986) 30
Berger v. *New York*, 388 U.S. 41 (1967) 34
Booth v. *Clark*, 58 U.S. (17 How.) 322 (1854) 37
Connecticut National Bank v. *Germain*, 503 U.S. 249 (1992) 23
Gelbard v. *United States*, 408 U.S. 41 (1972) 5
Hughes Aircraft Co. v. *Jacobson*, 525 U.S. 432 (1999) 17

Page

Cases—continued:

Lamie v. *United States Trustee*,
540 U.S. 526 (2004) 24
Loughrin v. *United States*, 134 S. Ct. 2384 (2014) 19
Moore v. *Mitchell*, 281 U.S. 18 (1930) 37
Riley v. *California*, 134 S. Ct. 2473 (2014) 32
Schindler Elevator Corp. v. *United States ex rel. Kirk*, 563 U.S. 401 (2011) 22
Toland v. *Sprague*, 37 U.S. (12 Pet.) 300 (1838) 37
United States v. *Acon*, 513 F.2d 513 (3d Cir. 1975) 29, 30
United States v. *Chavez*, 416 U.S. 562 (1974) ..... *passim*
United States v. *Donovan*, 429 U.S. 413 (1977) 29
United States v. *Giordano*, 416 U.S. 505 (1974) ..... *passim*
United States v. *Glover*,
736 F.3d 509 (D.C. Cir. 2013) ..... *passim*
United States v. *Jones*, 565 U.S. 400 (2012) 32
United States v. *Lawson*,
545 F.2d 557 (7th Cir. 1975) 29
United States v. *Leon*, 468 U.S. 897 (1984) 26
United States v. *Nelson*,
837 F.2d 1519 (11th Cir.),
cert. denied, 488 U.S. 829 (1988) 30
United States v. *North*,
735 F.3d 212 (5th Cir. 2013) 30, 36
United States v. *Radcliff*,
331 F.3d 1153 (10th Cir.),
cert. denied, 540 U.S. 973 (2003) 12, 26
United States v. *Robertson*,
504 F.2d 289 (5th Cir. 1974),
cert. denied, 421 U.S. 913 (1975) 29
United States v. *Swann*, 526 F.2d 147 (9th Cir. 1975) 30
United States v. *Timmreck*, 441 U.S. 780 (1979) 30
United States v. *Vigi*, 515 F.2d 290 (6th Cir.),
cert. denied, 423 U.S. 912 (1975) 29
Weinberg v. *United States*,
126 F.2d 1004 (2d Cir. 1942) 37

Page

Constitution, statutes, and rule:

U.S. Const. Amend. IV 3, 26
Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 6
Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. 3, 82 Stat. 197, 212 (codified at 18 U.S.C. 2510-2520) ..... *passim*
18 U.S.C. 2510(9) 6
18 U.S.C. 2510(11) 18
18 U.S.C. 2515 ..... *passim*
18 U.S.C. 2516 5
18 U.S.C. 2516(1) 20
18 U.S.C. 2518 5
18 U.S.C. 2518(1) 5, 35
18 U.S.C. 2518(1)(c) 5, 38
18 U.S.C. 2518(3) ..... *passim*
18 U.S.C. 2518(3)(a) 6
18 U.S.C. 2518(3)(b) 6
18 U.S.C. 2518(4) 7, 28
18 U.S.C. 2518(5) 5, 7, 35, 38
18 U.S.C. 2518(6) 7
18 U.S.C. 2518(8)(a) 8
18 U.S.C. 2518(8)(d) 8
18 U.S.C. 2518(10)(a) 8, 18, 19
18 U.S.C. 2518(10)(a)(i) 19
18 U.S.C. 2518(10)(a)(ii) ..... *passim*
18 U.S.C. 2518(10)(a)(iii) 19
18 U.S.C. 3041 (1964) 6
28 U.S.C. 1254(1) 2
Fed. R. Crim. P. 41(b) 35, 37

Page

Miscellaneous:

Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. (1967) 40

Jennifer Daskal, *The Un-Territoriality of Data*, 125 Yale L.J. 326 (2015) 37

Christopher Doval et al., *The Communications Assistance for Law Enforcement Act: An Assessment of Policy Through Cost and Application*, 32 Temp. J. Sci. Tech. & Envtl. L. 155 (2013) 31

Kyle G. Grimm, *The Expanded Use of Wiretap Evidence in White-Collar Prosecutions*, 33 Pace L. Rev. 1146 (2013) 31

National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, *Electronic Surveillance* (1976) 35, 36

Presidential Commission on Law Enforcement and the Administration of Justice, *The Challenge of Crime in a Free Society* (1967) 34

S. Rep. No. 541, 99th Cong., 2d Sess. (1986) 7, 33, 39

S. Rep. No. 1097, 90th Cong., 2d Sess. (1968) ..... *passim*

United States Courts, *Wiretap Report 2016* (Dec. 31, 2016) <tinyurl.com/wiretap2016> 31

In the Supreme Court of the United States

No. 17-43

LOS ROVELL DAHDA AND ROOSEVELT RICO DAHDA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals in *United States* v. *Los Dahda* (Pet. App. 1a-31a) is reported at 853 F.3d 1101. The opinion of the court of appeals in *United States* v. *Roosevelt Dahda* (Pet. App. 32a-58a) is reported at 852 F.3d 1282. The order of the district court denying petitioners' motion to suppress (Pet. App. 59a-65a) is unreported. The magistrate judge's report and recommendation that petitioners' motion be denied (Pet. App. 66a-76a) is also unreported.

JURISDICTION

The judgments of the court of appeals were entered on April 4, 2017. The petition for a writ of certiorari was filed on July 3, 2017, and granted on October 16, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2515 of Title 18 of the United States Code provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Section 2518(3) of Title 18 of the United States Code provides in relevant part:

> Upon * * * application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction) * * *.

Section 2518(10)(a) of Title 18 of the United States Code provides in relevant part:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer,

agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval. * * *

STATEMENT

This case presents a question concerning the suppression of evidence in criminal trials—not under the judge-made rules applicable to the Fourth Amendment, but rather under a statutory provision specifically governing facially insufficient wiretap orders. In Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Congress established a scheme under which courts may authorize the government to intercept wire, oral, and electronic communications in certain "circumscribed" circumstances. See *United States* v. *Giordano*, 416 U.S. 505, 512 (1974). To safeguard against unwarranted invasions of privacy, "Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint." *Id.* at 515.

As is relevant here, Title III authorizes a judge to issue a wiretap order to intercept communications only within the court's territorial jurisdiction. And to ensure that wiretap orders comply with its detailed require-

ments, Title III requires the suppression of evidence derived from an order that is "insufficient on its face." 18 U.S.C. 2518(10)(a)(ii).

In this case, the district court issued wiretap orders authorizing the interception of communications outside the court's territorial jurisdiction, in contravention of Title III. Petitioners moved to suppress the evidence derived from the facially insufficient orders, but the district court denied the motion to suppress, and petitioners were convicted of various drug-related offenses.

The court of appeals affirmed. It agreed with petitioners that the orders were facially insufficient under Title III. But the court interpreted Section 2518(10)(a)(ii) to include an additional, atextual requirement: namely, that the facial insufficiency must result from a statutory violation that implicates a "core concern" of Title III in order to warrant suppression. After determining that Title III's territorial-jurisdiction limitation did not implicate such a core concern, the court of appeals upheld the district court's decision not to suppress the evidence derived from the facially insufficient orders at issue. The court of appeals' interpretation is irreconcilable with the plain text of Title III and the Court's decisions construing the statute, and its judgments in this case should therefore be reversed.

A. Background

1. In Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, Congress established a detailed scheme regulating the interception of wire communications. Title III permits courts to authorize the government to intercept oral, wire, and electronic communications in connection with the investigation of enumerated serious crimes. "[A]lthough Title III author-

izes invasions of individual privacy under certain circumstances, the protection of privacy was an overriding congressional concern." *Gelbard* v. *United States*, 408 U.S. 41, 48 (1972). Congress accordingly specified in detail who may apply for a wiretap order, what circumstances justify approval of a wiretap application, and what information must appear in the application and the order authorizing the interception. See 18 U.S.C. 2516, 2518; *Giordano*, 416 U.S. at 515. Congress prohibited all interceptions of oral and wire communications except those specifically permitted by the Act. See *Giordano*, 416 U.S. at 514.

To obtain a wiretap order, a law-enforcement official must file an application with a judge of competent jurisdiction. See 18 U.S.C. 2518(1). The application must state, among other things, the place where the communication is to be intercepted; the type of communications sought to be intercepted; the identity of the person, if known, whose communications are to be intercepted; and the identities of the law-enforcement official making the application and the official authorizing the application. See *ibid.* Moreover, because wiretapping was intended to be a method of last resort, the application must provide a "full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. 2518(1)(c).

Under Title III, authority to intercept may be granted only for as long as is necessary to achieve the objectives of interception—and in no case for longer than 30 days. See 18 U.S.C. 2518(5). In addition, interception must be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Title III, and it must terminate upon attainment of the authorized objective. See *ibid.*

2. Congress also imposed significant limits on who may approve wiretap applications. Preexisting law allowed federal search warrants to be issued by mayors and United States commissioners (the forerunners of federal magistrate judges). See 18 U.S.C. 3041 (1964). That standard, however, was deemed "too permissive for the interception of wire or oral communications." S. Rep. No. 1097, 90th Cong., 2d Sess. 91 (1968). Accordingly, in Title III, Congress restricted the authority to approve wiretap applications to federal district court and court of appeals judges (and state judges holding equivalent positions). See 18 U.S.C. 2510(9). Approval of wiretap applications is discretionary; a judge may enter a wiretap order as requested, or modify it. See 18 U.S.C. 2518(3). Those provisions were "intended to guarantee responsible judicial participation in the decision to use [wiretap] techniques." S. Rep. No. 1097, *supra*, at 91.

Before approving a wiretap application, the judge must determine that "there is probable cause for belief that an individual is committing, has committed, or is about to commit" an enumerated offense and that "there is probable cause for belief that particular communications concerning that offense will be obtained through [the] interception." 18 U.S.C. 2518(3)(a)-(b). The authority to approve wiretap applications is subject to numerous additional constraints. See 18 U.S.C. 2518(3)-(5).

Of particular relevance here, Title III permits a judge to enter an order authorizing wiretapping only "within the territorial jurisdiction of the court in which the judge is sitting." 18 U.S.C. 2518(3). Since the initial enactment of Title III in 1968, Congress has amended that provision only once. In the Electronic Communications Privacy Act of 1986, Congress added a parenthetical to the jurisdictional limitation, permitting judicial authorization of the

interception of communications outside the court's territorial jurisdiction "in the case of a mobile interception device authorized by a Federal court within such jurisdiction." *Ibid.*[1]

A wiretap order must particularize the extent and nature of the interceptions that it authorizes. Much like a wiretap application, a wiretap order must specify, among other things, the identity of the person, if known, whose communications are to be intercepted; the place where the authority to intercept is granted; the type of communications to be intercepted; and the period of time during which interception is authorized. See 18 U.S.C. 2518(4).

Once an order permitting interception of communications is issued, the issuing judge maintains continuing scrutiny over the investigation. A wiretap order can authorize interception only for as long as "is necessary to achieve the objective of the authorization," and, at most, for 30 days. 18 U.S.C. 2518(5). The issuing judge, however, may extend the authorization based on further application by law-enforcement officials at the end of the authorized period. See *ibid.* The judge may order the government to provide periodic reports regarding the progress of the investigation and the need for continued interception. See 18 U.S.C. 2518(6). The judge also maintains official control of the custody of any recordings or tapes produced by the authorized interceptions. See 18 U.S.C. 2518(8)(a). And upon termination of the order's

---

[1] The phrase "mobile interception device" is not separately defined. According to a Senate Judiciary Committee report accompanying the 1986 amendment, Congress's objective in adding the parenthetical was to ensure that a wiretap order would remain effective in the event that a target vehicle was moved out of the issuing judge's jurisdiction after the order was issued, but before a surveillance device could be placed in the vehicle. See S. Rep. No. 541, 99th Cong., 2d Sess. 106 (1986).

authorization period, the judge is responsible for providing notice to the persons whose communications were intercepted. See 18 U.S.C. 2518(8)(d).

3. To enforce the various requirements of Title III, Congress adopted a mandatory suppression remedy for violations of those requirements. Title III provides that, "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial * * * if the disclosure of that information would be in violation of this chapter." 18 U.S.C. 2515.

"What disclosures are forbidden, and are subject to motions to suppress, is in turn governed by [Section] 2518(10)(a)[.]" *Giordano*, 416 U.S. at 524. Under that provision, an aggrieved person may move to suppress the contents of any communication intercepted pursuant to the statute on three grounds:

> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

18 U.S.C. 2518(10)(a).

B. Facts And Procedural History

1. In 2011, the Drug Enforcement Agency and the Lawrence, Kansas, Police Department began a joint investigation into a suspected marijuana distribution ring. The initial investigation focused on a handful of individuals, not including petitioners. Through the use of investigative techniques, including numerous wiretap orders, the investigation expanded. In 2012, a grand jury in the

District of Kansas indicted petitioners, along with 41 other individuals, on various counts arising from an alleged conspiracy to distribute marijuana and other drugs. Pet. App. 3a-4a.

Before trial, petitioners moved to suppress evidence derived from nine wiretap orders issued by the United States District Court for the District of Kansas. Those orders authorized the government to intercept communications on certain mobile telephones used by petitioners and other individuals. Petitioners argued that the contents of the intercepted communications must be suppressed because the orders on their face exceeded the district court's territorial jurisdiction. Pet. App. 1a-2a, 14a, 33a, 39a-40a, 64a, 66a n.1.

Each of the wiretap orders at issue stated that, "in the event [the target telephones] are transported outside the territorial jurisdiction of the court, interception may take place in any other jurisdiction within the United States." J.A. 97, 105, 114, 123, 132, 140, 149, 158, 168, 174. The orders were insufficient on their faces because they affirmatively authorized interception outside the issuing court's jurisdiction in violation of Section 2518(3).

The government was aware that the targeted telephones were frequently transported outside Kansas; one of the wiretap orders targeted a phone used by a suspect known to reside in California. J.A. 136, 139. Pursuant to the terms of that order, the government maintained a listening post in Missouri to monitor calls from the California phone. In response to petitioners' motions to suppress, the government agreed not to use any communications intercepted at the Missouri listening post, thus implicitly recognizing that the order was facially insufficient under Section 2518(3).

2. The district court referred petitioners' motion to suppress to a magistrate judge, who recommended that

the court deny the motion. Pet. App. 66a-76a. Accepting the government's concession that it would not use any communications intercepted at the Missouri listening post, see *id.* at 68a n.7, the magistrate judge believed that the wiretap orders were not improper because, although they "*permitted* interception outside this court's jurisdiction, the government did not actually intercept cellular communications outside this court's jurisdiction." *Id.* at 72a-73a.

The district court overruled petitioners' objections and adopted the magistrate judge's report and recommendation. Pet. App. 59a-65a. In particular, the district court reaffirmed the magistrate judge's conclusion that the wiretap orders, "as applied," did not violate Title III. *Id.* at 64a.

At trial, evidence from the wiretap orders made up "[m]uch of the evidence" against petitioners. Pet. App. 14a, 39a. Petitioner Los Dahda was convicted on 15 counts of drug-related offenses and sentenced to 189 months of imprisonment. Petitioner Roosevelt Dahda was convicted on 10 counts and sentenced to 201 months of imprisonment.

3. On appeal, petitioners contended that the evidence derived from the wiretap orders should have been suppressed under 18 U.S.C. 2518(10)(a)(ii). As is relevant here, however, the court of appeals affirmed. Pet. App. 1a-31a, 32a-58a.[2] The court ruled in favor of the government on the suppression issue in petitioner Los Dahda's case, *id.* at 14a-25a, and then relied on that holding to reach the same conclusion in petitioner Roosevelt Dahda's case, *id.* at 40a.

---

[2] Then-Judge Gorsuch participated in the oral argument but not the decisions in this case. See Pet. App. 1a n.*, 32a n.*.

a. At the outset, the court of appeals agreed with petitioners that the wiretap orders were facially insufficient because they exceeded the district court's territorial jurisdiction in violation of 18 U.S.C. 2518(3). Pet. App. 15a-20a. Relying on its own and other circuits' precedent, the court of appeals determined that interception occurs "both where the tapped telephones are located and where law enforcement officers put their listening post." *Id.* at 16a-17a. Because the orders at issue "authorized interception of cell phones located outside the issuing court's territorial jurisdiction, using listening posts that were also stationed outside the court's territorial jurisdiction," the orders violated Title III. *Id.* at 17a.

The court of appeals rejected the government's invocation of the statutory exception for the use of a "mobile interception device," reasoning that the exception covered only cases in which law-enforcement officials were specifically authorized to use a "mobile device for intercepting communications," such as a bug attached to a car phone. Pet. App. 20a. The phrase "mobile interception device," the court explained, plainly did not include stationary interception devices (or the mobile phones themselves), but instead referred to interception devices that were themselves mobile. *Id.* at 18a-20a. The court noted that, although the calls used at trial were intercepted within the issuing court's territorial jurisdiction, "the orders would have allowed interception of calls outside the issuing court's jurisdiction" and thus were facially insufficient. *Id.* at 24a & n.7.

Despite its determination that the wiretap orders were facially insufficient, the court of appeals proceeded to hold that Section 2518(10)(a)(ii) did not require suppression of evidence derived from those orders. Pet. App. 22a-25a. The court acknowledged that Section 2518(10)(a)(ii) provides for the suppression of evidence derived

from a facially insufficient wiretap order. *Id.* at 15a. It concluded, however, that only *some* facially insufficient wiretaps require suppression. *Id.* at 21a. In the court of appeals' view, suppression is required only for violation of "those statutory requirements that directly and substantially implement[] the congressional intention to limit the use of intercept procedures." *Ibid.* (internal quotation marks and citation omitted).

In applying that additional, atextual requirement, the court of appeals relied on its previous decision in *United States* v. *Radcliff*, 331 F.3d 1153 (10th Cir.), cert. denied, 540 U.S. 973 (2003). See Pet. App. 21a. In *Radcliff*, as in this case, the court of appeals considered whether Title III requires the suppression of evidence derived from a facially insufficient wiretap order. See 331 F.3d at 1162. To answer that question, the court of appeals looked to this Court's decisions in *United States* v. *Chavez*, 416 U.S. 562 (1974), and *United States* v. *Giordano*, 416 U.S. 505 (1974). See 331 F.3d at 1162. Those decisions considered a different provision, Section 2518(10)(a)(i), which requires the suppression of "unlawfully intercepted" communications. See *Chavez*, 416 U.S. at 574-575; *Giordano*, 416 U.S. at 525-526.[3]

In *Chavez* and *Giordano*, this Court reasoned that not every violation of Title III's requirements results in "unlawful[] intercept[ion]" under Section 2518(10)(a)(i); otherwise, the provision would render surplusage the other two provisions requiring suppression for certain violations (Section 2518(10)(a)(ii), for cases involving facially insufficient orders, and Section 2518(10)(a)(iii), for cases involving unauthorized interceptions). See *Chavez*, 416

---

[3] *Chavez* and *Giordano* were decided on the same day, and *Chavez* incorporates by reference the statutory analysis in *Giordano*. See, *e.g.*, *Chavez*, 416 U.S. at 570.

U.S. at 574-575; *Giordano*, 416 U.S. at 525-526. The Court therefore concluded that suppression under Section 2518 (10)(a)(i) for "unlawful[] intercept[ion]" was required only for "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Giordano*, 416 U.S. at 527. Lower courts have since described the standard for suppression set forth in *Chavez* and *Giordano* as establishing a requirement that the government's violation implicate the "core concerns" underlying Title III. See p. 30 n.7, *infra*.

Applying the "core concerns" test to Section 2518(10)(a)(ii) in this case, the court of appeals concluded that violation of the territorial-jurisdiction restriction in Section 2518(3), while rendering the orders facially insufficient, did not require suppression because "the territorial defect did not directly and substantially affect a congressional intention to limit wiretapping." Pet. App. 14a. According to the court, the core concerns animating Title III were "(1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." *Id.* at 21a (quoting S. Rep. No. 1097, *supra*, at 66).

The court of appeals determined that the orders at issue did not implicate Congress's privacy concern because Section 2518(3)'s territorial-jurisdiction limitation "was not mentioned in the legislative history" of Title III. Pet. App. 22a. The court further determined that the orders did not implicate Congress's uniformity concern either because the territorial-jurisdiction limitation "potentially

undermine[s] uniformity by requiring prosecutors in multiple jurisdictions to coordinate about how they use electronic surveillance." *Id.* at 23a.

The court of appeals acknowledged that its conclusion that the territorial-jurisdiction limitation did not implicate a "core concern" of Title III conflicted with the decision of the District of Columbia Circuit in *United States* v. *Glover*, 736 F.3d 509 (2013). Pet. App. 21a. Confronted with a similar facial insufficiency in that case, the D.C. Circuit reached two dispositive holdings, both of which diverged from the Tenth Circuit's holdings in this case. First, the D.C. Circuit held that the "core concerns" test did not apply to motions to suppress evidence from facially insufficient orders under Section 2518(10)(a)(ii); rather, suppression under that provision was a "mechanical test." *Glover*, 736 F.3d at 513. Second, it held in the alternative that, even if the "core concerns" test did apply, the territorial-jurisdiction limitation implicated a core concern of Title III. See *id.* at 515.

b. Judge Lucero concurred. Pet. App. 30a-31a. He joined the majority opinion but wrote separately to note that Title III is "in need of congressional attention" to address "[a]dvances in wiretapping technology." *Ibid.*

SUMMARY OF ARGUMENT

At bottom, this case presents a simple question: Did Congress mean what it said when it required suppression of evidence derived from a facially insufficient wiretap order? Under familiar rules of statutory interpretation, the answer to that question is yes. The court of appeals' decision to jettison the statute's plain text and impose a judge-made limitation on Title III's mandatory suppression remedy was an act of statutory invention, not statutory interpretation. Its judgments should be reversed.

I. The relevant provisions of Title III are unambiguous and straightforward. Section 2515 directs courts to suppress evidence obtained from a wiretap order authorized under the statute if "the disclosure of that information would be in violation of this chapter." Section 2518(10)(a)(ii), in turn, specifically and unambiguously states that the suppression of wiretap evidence is required if "the order of authorization or approval under which it was intercepted is insufficient on its face." Title III establishes no other requirement for suppression in the case of a facially insufficient order.

Title III therefore compels suppression of the evidence derived from the wiretap orders at issue here. Those orders were facially insufficient because they authorized collection of evidence anywhere within the United States, in disregard of Title III's clear limitation that a judge may authorize interception of communications only "within the territorial jurisdiction of the court in which the judge is sitting." 18 U.S.C. 2518(3).

The court of appeals' decision to cabin the circumstances in which evidence derived from a facially insufficient wiretap order must be suppressed cannot be justified under traditional principles of statutory interpretation. Congress specifically chose to provide for suppression regardless of whether a wiretap order's facial insufficiency implicates a "core concern" of Title III. That choice cannot be negated under the guise of statutory interpretation.

United States v. *Chavez*, 416 U.S. 562 (1974), and *United States* v. *Giordano*, 416 U.S. 505 (1974), do not support the court of appeals' imposition of an additional, atextual "core concerns" requirement. In those decisions, the Court adopted the "core concerns" test as a construction of the phrase "unlawfully intercepted" in subpara-

graph (i) of Section 2518(10)(a), and it did so for the specific purpose of distinguishing subparagraph (i) from subparagraphs (ii) and (iii). That test is not, and was not intended to be, a substantive limitation on Title III's suppression remedy as a whole. Reading a "core concerns" requirement into subparagraph (ii) would turn the Court's construction upside down by rendering subparagraph (ii) superfluous. Only by enforcing subparagraph (ii) as written can courts give independent meaning to each of the enumerated grounds for suppression in Section 2518 (10)(a).

II. Even assuming that the "core concerns" test were a prerequisite under Section 2518(10)(a)(ii) as well as Section 2518(10)(a)(i), the suppression of evidence derived from an extraterritorial wiretap order would still be required. In drafting Title III, Congress sought to guard against the overuse of electronic surveillance by requiring judges to review and authorize every wiretap application and to maintain ongoing supervision of the use of wiretaps.

The strict enforcement of Title III's territorial-jurisdiction restriction would limit the ability of law-enforcement officials to engage in forum shopping as a means of evading the searching judicial review of wiretap applications that Congress envisioned. The territorial-jurisdiction limitation thus directly implicates Title III's "core concern" of protecting privacy, as well as the fundamental principle of our legal system that courts may act only within their own jurisdictions. Even under the "core concerns" test, the court of appeals' judgments in this case cannot stand. Those judgments should be reversed.

ARGUMENT

I. TITLE III REQUIRES THE SUPPRESSION OF EVIDENCE OBTAINED PURSUANT TO A FACIALLY INSUFFICIENT WIRETAP ORDER

A. The Plain Text Of Section 2518(10)(a)(ii) Unambiguously Requires Suppression

As in all statutory-interpretation cases, this Court's analysis "begins with the language of the statute." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks and citation omitted). "And where the statutory language provides a clear answer, it ends there as well." *Ibid.* Here, the statutory scheme unambiguously makes suppression the remedy when evidence is derived from a wiretap order that is "insufficient on its face." 18 U.S.C. 2518(10)(a)(ii).

1. Congress enacted Title III to "prohibit, on the pain of criminal and civil penalties, all interceptions of oral and wire communications, except those specifically provided for in [the statute]." *United States* v. *Giordano*, 416 U.S. 505, 514 (1974) (footnote omitted). In furtherance of that goal, Congress provided in Section 2515 that, "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence * * * if the disclosure of that information would be in violation of this chapter." 18 U.S.C. 2515. Section 2515 thus "imposes an evidentiary sanction to compel compliance" with Title III's requirements. S. Rep. No. 1097, *supra*, at 96.

"What disclosures are forbidden, and are subject to motions to suppress, is in turn governed by [Section] 2518(10)(a), which provides for suppression of evidence on [three] grounds." *Giordano*, 416 U.S. at 524; cf. S. Rep. No. 1097, *supra*, at 106 (stating that Section 2518(10)(a)

"provides the remedy for the right created by section 2515"). Section 2518(10)(a) provides that an "aggrieved person * * * may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom," on three grounds:

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

18 U.S.C. 2518(10)(a).[4] If a motion to suppress is granted on one of those three enumerated grounds, the contents of the intercepted communication "shall be treated as having been obtained in violation of this chapter" in accordance with Section 2515. *Ibid.*

Section 2518(10)(a) thus supplies the specific grounds for invoking Section 2515's evidentiary sanction. And once one of the specific grounds in Section 2518(10)(a) has been satisfied, the statute imposes no additional prerequisites for suppression.

2. a. Under Section 2518(10)(a), a defendant may move to suppress evidence derived from wiretap orders because (i) the interception was "unlawful," (ii) the order authorizing interception was "insufficient on its face,"

---

[4] Title III separately defines an "aggrieved person" as a "person who was a party to" an intercepted communication or a "person against whom the interception was directed." 18 U.S.C. 2510(11). That definition "defines the class of those who are entitled to invoke the suppression sanction of section 2515" through "the motion to suppress provided for by section 2518(10)(a)." S. Rep. No. 1097, *supra*, at 91. It is undisputed here that petitioners are "aggrieved persons" for purposes of the statute.

"*or*" (iii) the interception was "not made in conformity with" the order. 18 U.S.C. 2518(10)(a) (emphasis added). Congress's use of the disjunctive "or" confirms that only one of the three grounds for suppression need be satisfied for suppression to occur. See, *e.g.*, *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014). And as a corollary, Congress's use of the word "or" indicates that each of the three grounds should be "given separate meanings." *Ibid.* (citation omitted).

Pursuant to subparagraph (i), evidence is subject to suppression if the communication at issue was "unlawfully intercepted." 18 U.S.C. 2518(10)(a)(i). Pursuant to subparagraph (ii), by contrast, evidence is subject to suppression if "the *order* * * * under which [the communication] was intercepted is insufficient on its face." 18 U.S.C. 2518(10)(a)(ii) (emphasis added). By its terms, subparagraph (ii) does not concern itself with how the communication was *actually* intercepted; instead, a court need only examine the four corners of the order itself to determine the facial sufficiency of the order under the statutory scheme. And the statute necessarily contemplates that an order may be "insufficient on its face," necessitating suppression under subparagraph (ii), even though the communication was not "unlawfully intercepted" under subparagraph (i).[5]

b. In *United States* v. *Chavez*, 416 U.S. 562 (1974), and *Giordano*, *supra*, this Court considered what it

---

[5] Similarly, subparagraph (iii) asks whether the communication was intercepted "in conformity with" the order. 18 U.S.C. 2518(10)(a)(iii). A wiretap order may be sufficient on its face and thus not violate subparagraph (ii). If the interception was not authorized by the order, however, suppression would still be required under subparagraph (iii).

means for a communication to have been "unlawfully intercepted" under Section 2518(10)(a)(i). In both cases, the specific question was whether the violation of the statutory requirement regarding who could authorize a wiretap application rendered the resulting interceptions "unlawful" for purposes of subparagraph (i).[6] The wiretap orders at issue were facially sufficient, and the communications had been intercepted in conformity with the authorization orders; as a result, there was no basis for suppression under Section 2518(10)(a)(ii) or (iii).

Notably for present purposes, in determining whether the resulting interceptions were "unlawful" for purposes of subparagraph (i), the Court discussed the interplay between the three subparagraphs. The Court explained that the "unlawful[] intercept[ions]" described in subparagraph (i) "must include some constitutional violations"; for example, suppression for lack of probable cause is "not provided for in so many words" by subparagraphs (ii) and (iii), and an interception without probable cause thus must fall within subparagraph (i). *Giordano*, 416 U.S. at 525-526. At the same time, the Court continued, subparagraphs (ii) and (iii) "plainly reach some purely statutory defaults without constitutional overtones, and these omissions cannot be deemed unlawful interceptions under [sub]paragraph (i)." *Id.* at 526. Were it otherwise, subparagraphs (ii) and (iii) would be surplusage. See *ibid.*

---

[6] In *Giordano*, the wiretap application erroneously stated that it had been authorized by one of the Department of Justice officials specified in 18 U.S.C. 2516(1); in fact, it had been authorized by an official who lacked the statutory authority to do so. See 416 U.S. at 525. In *Chavez*, the wiretap application erroneously stated that it had been authorized by one of the Department of Justice officials specified in 18 U.S.C. 2516(1); in fact, it had been authorized by another (but still appropriate) official. See 416 U.S. at 574.

The Court ultimately concluded that subparagraphs (ii) and (iii) "must be deemed to provide suppression for failure to observe some statutory requirements that would not render interceptions unlawful under [sub]paragraph (i)." *Giordano*, 416 U.S. at 527; see *Chavez*, 416 U.S. at 575. But the Court rejected the government's argument that subparagraph (i) should be limited only to constitutional violations. See *Giordano*, 416 U.S. at 527. To render subparagraph (i) applicable to some statutory violations without rendering subparagraphs (ii) and (iii) surplusage, the Court determined that the phrase "unlawfully intercepted" reached cases in which "there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Ibid.*

For present purposes, the key point is that the Court adopted the foregoing interpretation of subparagraph (i) precisely in order to give meaning to each of the subparagraphs of Section 2518(10)(a) and to avoid rendering any of them surplusage. See *Giordano*, 416 U.S. at 525-526. The Court plainly was not construing or limiting what it means for an order to be facially insufficient under subparagraph (ii). See *ibid.*

3. Under the plain language of Section 2518(10)(a)(ii), suppression is the mandatory remedy when evidence is derived from a wiretap order that is facially insufficient. The court of appeals correctly determined that the wiretap orders here were facially insufficient. Accordingly, the evidence derived from those orders should have been suppressed without any additional inquiry.

a. To begin with, as the court of appeals determined (Pet. App. 20a), each of the wiretap orders here was plainly "insufficient on its face." 18 U.S.C. 2518(10)(a)(ii).

Because Title III does not define the phrase "insufficient on its face," the Court should "look first to the [phrase's] ordinary meaning." *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011). The phrase "insufficient on its face" implies a comparison of the four corners (*i.e.* the "face") of the order itself and the requirements of Title III; if the failure to comply with those requirements is evident from the text of the order, then the order is naturally "insufficient on its face." See, *e.g.*, *Giordano*, 416 U.S. at 525 n.14 (comparing "the order, on its face," with the requirements of Section 2516(1) in order to determine whether the order was "insufficient on its face" under subparagraph (ii)); *Chavez*, 416 U.S. at 573-574 (same).

Here, the wiretap orders were facially insufficient because they exceeded the judge's authorizing powers: that is, they purported on their face to authorize interceptions that the judge did not have the power to authorize. Title III permits a judge to enter an order authorizing the interception of communications only "within the territorial jurisdiction of the court in which the judge is sitting." 18 U.S.C. 2518(3). The orders at issue here did not require law-enforcement officials to maintain their listening post in Kansas (nor did they require the target phones to be located in Kansas). Quite to the contrary, the orders specifically and affirmatively authorized interception to "take place in any other jurisdiction within the United States" if the target phones were transported out of the territorial jurisdiction of the court. J.A. 97, 105, 114, 123, 132, 140, 149, 158, 168, 174.

By permitting interception to take place anywhere in the United States, the orders impermissibly authorized the government to maintain their listening post outside Kansas—as the government in fact did, in the case of at

least one of the orders at issue. See p. 9, *supra*. The orders thus facially violated Title III's territorial-jurisdiction limitation. See Pet. App. 20a.

The statutory exception to the territorial limitation for use of "a mobile interception device" does not cure the facial insufficiency of the orders at issue. 18 U.S.C. 2518(3). As the government recognizes, that exception is applicable only "in narrow circumstances." Br. in Opp. 17. As the court of appeals explained, "the term 'mobile interception device' means a mobile device for intercepting communications," such as a mobile bug. Pet. App. 20a; see also *id.* at 17a n.4 (describing "small mobile devices" that "are capable of intercepting the content from cellphone calls"). The legislative history confirms that understanding of the term. See p. 7 n.1, *supra*. Because the orders here did not authorize use of a mobile interception device, that narrow exception does not apply and the orders were facially insufficient. See Pet. App. 20a.

b. Because the wiretap orders at issue here were facially insufficient, the evidence derived from those orders should have been suppressed. When faced with questions of statutory interpretation, this Court has stated "time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). In this case, the statutory text could not be any clearer: Section 2518(10)(a)(ii) requires the suppression of evidence derived from a wiretap order that is "insufficient on its face," without any further inquiry into whether the insufficiency resulted from the violation of a provision that implicates a "core concern" of Title III. As Judge Silberman explained in his opinion for the D.C. Circuit, subparagraph (ii) creates a "mechanical test" under which "[s]uppression is the mandatory remedy." *United States* v. *Glover*, 736 F.3d 509,

513 (2013). And where, as here, the statutory text is unambiguous, the sole function of the courts is to enforce its terms, unless the resulting interpretation would be absurd. See, *e.g.*, *Lamie* v. *United States Trustee*, 540 U.S. 526, 534 (2004).

Far from being absurd, requiring suppression for evidence derived from a facially insufficient wiretap order is entirely consistent with Congress's intent to "prohibit * * * all interceptions of oral and wire communications, except those specifically provided for in the Act." *Giordano*, 416 U.S. at 514. Although Congress recognized the importance of wiretapping in combating crime, Congress expressed concern that electronic surveillance posed a grave threat to the privacy of Americans. See, *e.g.*, S. Rep. No. 1097, *supra*, at 66-67.

To protect against that threat, Congress delineated in exacting detail the requirements for, and limitations on, wiretap applications and orders. The Senate report explained that "[t]he application must conform to section 2518" and that "[t]he judicial officer's decision is also circumscribed by section 2518." S. Rep. No. 1097, *supra*, at 97. The Senate report further stressed that Title III's suppression remedy was "necessary and proper to protect privacy" and "should serve to guarantee that the standards of [Title III] will sharply curtail the unlawful interception of wire and oral communications." *Id.* at 96. Requiring the suppression of evidence derived from authorization orders that violate the various requirements of Title III, then, is not at odds with the statute; it is exactly what Congress intended. Accordingly, this Court should enforce Section 2518(10)(a)(ii) according to its terms. See *Lamie*, 540 U.S. at 534.

c. The court of appeals' failure to suppress the evidence from the wiretap orders at issue here requires reversal of the judgments below. As the court of appeals

acknowledged, "[m]uch of the evidence" against petitioners was obtained through the facially insufficient wiretap orders. Pet. App. 14a, 39a. Any error here cannot be deemed harmless in light of the government's heavy reliance on that invalidly obtained evidence at trial and in its briefing before the court of appeals. See 15-3236 Gov't C.A. Br. 3-6.

B. The Court Of Appeals' Contrary Interpretation Of Section 2518(10)(a)(ii) Is Deeply Flawed

The court of appeals correctly determined that the wiretap orders at issue in this case were facially insufficient. But the court of appeals erred when it held that a court may suppress evidence derived from a facially insufficient wiretap order under Section 2518(10)(a)(ii) only if the statutory violation "directly and substantially affect[ed] a congressional intention to limit wiretapping." Pet. App. 14a. That interpretation of Section 2518(10)(a)(ii) is incorrect and should be rejected. Engrafting an atextual "core concerns" requirement onto Title III's mandatory suppression remedy is inconsistent with the plain text of the statute and would undermine, not implement, this Court's decisions in *Chavez* and *Giordano*.

1. As explained above, the text of Section 2518(10)(a)(ii) provides that suppression is required where a wiretap order is "insufficient on its face." That remedy is mandatory without regard to whether the communication was also "unlawfully intercepted" for purposes of subparagraph (i) or whether the facial insufficiency implicates a "core concern" of Title III.

Under the court of appeals' interpretation, however, defendants must satisfy an additional, judge-made "core concerns" requirement before they can invoke the suppression remedy. Such a judicially fashioned limitation may be permissible when considering the exclusionary

rule under the Fourth Amendment. Cf., *e.g.*, *United States* v. *Leon*, 468 U.S. 897 (1984). But Congress did not leave the decision whether to suppress wiretap evidence collected in violation of Title III's requirements to the discretion of the federal courts. Instead, Congress created a comprehensive statutory scheme for wiretap surveillance with its own "circumscribed" procedures and protections. *Giordano*, 416 U.S. at 512. Under that scheme, "[t]here is no room for judicial discretion." *Glover*, 736 F.3d at 513. Rather, a court is obligated to "determine if Congress has provided that suppression is required for [a] particular procedural error." *Chavez*, 416 U.S. at 570.

With respect to facially insufficient wiretap orders, Congress specifically chose to require suppression even where the insufficiency does not result in the unlawful interception of communications under subparagraph (i). The court of appeals had no power to override that congressional choice. Because "the statutory remedy is automatic" under Section 2518(10)(a)(ii), *Glover*, 736 F.3d at 516, the court of appeals' failure to suppress the fruits of the facially invalid orders was erroneous.

2. In the decisions under review, the court of appeals provided little justification for its atextual reading of the statute, relying primarily on its earlier opinion in *United States* v. *Radcliff*, 331 F.3d 1153 (10th Cir. 2003). There, the court of appeals acknowledged that this Court had articulated the "core concerns" requirement "with respect to motions to suppress under [Section 2518(10)(a)(i)]." 331 F.3d at 1162. But the court of appeals nevertheless concluded, without explanation, that "th[e] requirement is equally applicable to motions to suppress under [Section] 2518(10)(a)(ii)." *Ibid.*

That reasoning, such as it was, was mistaken. This Court's decisions in *Chavez* and *Giordano* do not extend the "core concerns" test into subparagraph (ii), and the

rationales of those decisions provide no support for doing so. Indeed, extending the "core concerns" test to subparagraph (ii) would produce the very redundancy this Court sought to avoid in *Chavez* and *Giordano* when it first adopted that test as a way of narrowing the phrase "unlawfully intercepted" in subparagraph (i).

a. As a preliminary matter, this Court expressly held that the wiretap orders at issue in *Chavez* and *Giordano were* facially sufficient; they stated that the underlying applications had been authorized by an Assistant Attorney General, when in fact they had been authorized by other individuals. See pp. 20 n.6, 22, *supra*. There was thus no basis for suppression under Section 2518 (10)(a)(ii); the question in those cases was whether violation of the statutory requirement regarding who could authorize a wiretap application rendered the resulting interceptions of communications "unlawful" for purposes of subparagraph (i). See *Chavez*, 416 U.S. at 574; *Giordano*, 416 U.S. at 525.

In answering that question, the Court recognized the potential for overlap between, and gaps within, the three subparagraphs of Section 2518(10)(a). The Court explained that the "unlawful[] intercept[ions]" described in subparagraph (i) "must include some constitutional violations"; for example, suppression for lack of probable cause is "not provided for in so many words" by subparagraphs (ii) and (iii), and an interception without probable cause thus must fall within subparagraph (i). *Giordano*, 416 U.S. at 525-526. The Court then noted that subparagraphs (ii) and (iii) "plainly reach some purely statutory defaults without constitutional overtones, and these omissions cannot be deemed unlawful interceptions under [sub]paragraph (i)." *Id.* at 526. Were it otherwise, subparagraphs (ii) and (iii) would be surplusage. See *ibid.* The restriction on subparagraph (i) adopted in *Chavez*

and *Giordano*—the "core concerns" test—was intended to address the latter problem and to avoid leaving any of the subparagraphs of Section 2518(10)(a) "drained of all meaning." *Giordano*, 416 U.S. at 525-526; see *Chavez*, 416 U.S. at 575.

If suppression for facial insufficiency under subparagraph (ii) were limited to situations in which the relevant statutory violation implicated the "core concerns" of Title III, however, it would recreate the very problem that this Court fixed in *Chavez* and *Giordano*. Under such a construction, any violation that gives rise to suppression under subparagraph (ii) would also do so under subparagraph (i). As a result, applying the "core concerns" test to subparagraph (ii) "would actually treat that [sub]paragraph as 'surplusage'—precisely what [the] Court tried to avoid in *Giordano*." *Glover*, 736 F.3d at 514.

b. Notably, neither the Tenth Circuit (in the decisions below) nor the government (in opposing certiorari) identified a single circumstance in which, under their interpretation, a facially insufficient order would require suppression under subparagraph (ii) but the interception would not also require suppression under subparagraph (i). The court of appeals did not address the redundancy problem at all. And for its part, the government merely hypothesized that "a court *might* conclude that suppression is warranted under subparagraph (ii) even if the interception complied with the terms of the order and was not 'unlawful[]' under subparagraph (i)" in one circumstance: namely, where "the identity of the person whose communications are to be intercepted" was "known" under 18 U.S.C. 2518(4) but not included in the wiretap order. Br. in Opp. 15 (emphasis added). But the government offered no authority to support its *ipse dixit* assertion that suppression would be warranted in that circumstance under paragraph (ii)—nor could it, given that the government's

hypothetical closely resembles the facts of an actual case: *United States* v. *Donovan*, 429 U.S. 413 (1977).

In *Donovan*, the relevant wiretap applications identified some persons whose communications were to be intercepted, but failed to identify additional known persons. See 429 U.S. at 419-420. The Court stated that there was "no basis" to suggest the wiretap orders were facially insufficient under subparagraph (ii). *Id.* at 432. That made eminent sense, because it would have been impossible to detect from the four corners of the orders that the underlying applications failed to identify the additional persons at issue. The Court proceeded to hold that the failure to identify those persons in the applications did not require suppression under subparagraph (i) either, because it did not implicate the "core concerns" of Title III. See *id.* at 433-435. *Donovan* thus demonstrates that, in the government's hypothetical, the defect would not implicate subparagraph (ii) at all.

3. The decision under review is far from the only one to graft an additional "core concerns" requirement onto the mandatory suppression remedy in Section 2518(10)(a)(ii). But insofar as other courts of appeals have reached the same conclusion, it should in no way affect this Court's analysis; those courts have merely relied on the same overbroad reading of *Chavez* and *Giordano* discussed above. See *United States* v. *Acon*, 513 F.2d 513, 516-517 (3d Cir. 1975); *United States* v. *Robertson*, 504 F.2d 289, 292 (5th Cir. 1974), cert. denied, 421 U.S. 913 (1975); *United States* v. *Vigi*, 515 F.2d 290, 293 (6th Cir.), cert. denied, 423 U.S. 912 (1975); *United States* v. *Lawson*, 545

F.2d 557, 562 (7th Cir. 1975); *United States* v. *Swann*, 526 F.2d 147, 148-149 (9th Cir. 1975) (per curiam).[7]

Remarkably, some courts have adopted that interpretation of subparagraph (ii) while recognizing that, under the logic of *Giordano*, the "core concerns" test *should not* be applied to subparagraph (ii). For example, the Third Circuit acknowledged that *Giordano* "impl[ies] that [sub]-paragraphs (ii) and (iii) must reach violations of some provisions of Title III which do not directly and substantially implement the congressional intent to limit use of wiretaps." *Acon*, 513 F.2d at 517. But it nevertheless went on to insist that, "[d]espite this intention to extend [subparagraph (ii)] further than [subparagraph (i)]," there was a "distinction between information which the government may vary by subsequent affidavit and information which must stand on the four corners of the affidavit," with the result that suppression is not required for "facial insufficiency relating to less critical requirements." *Id.* at 518.

---

[7] The phrase "core concerns" appears to have originated in the Eleventh Circuit's decision in *Adams* v. *Lankford*, 788 F.2d 1493 (1986). There, the court considered whether a violation of Section 2518(3)'s territorial-jurisdiction limitation was an error of sufficient magnitude to be cognizable on a petition for habeas corpus. See 788 F.2d at 1495. Relying on this Court's habeas jurisprudence, the Eleventh Circuit determined that the relevant inquiry was "whether the asserted Title III violations are merely formal or technical errors, or whether the alleged violations implicate the core concerns of Title III." *Id.* at 1497 (citing *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979)). The Eleventh Circuit later extended that "core concerns" analysis to direct review. See *United States* v. *Nelson*, 837 F.2d 1519, 1527 (11th Cir.), cert. denied, 488 U.S. 829 (1988). Other courts have since applied that label to the additional requirement set out in *Chavez* and *Giordano*. See, *e.g.*, Pet. App. 21a; *Glover*, 736 F.3d at 513; *United States* v. *North*, 735 F.3d 212, 218 (5th Cir. 2013) (DeMoss, J., concurring).

With all due respect, that is not an appropriate method of statutory interpretation. When Congress crafts an unambiguous statutory provision, a court is not free to pick and choose the parts of that provision it will enforce, even if it views certain aspects of the provision to be "less critical." And when this Court gives that statutory provision an interpretation—whether express or "impl[ied]"—lower courts must give effect to that interpretation. *Acon*, 513 F.2d at 517. Congress's clear "intention to extend [subparagraph (ii)] further than [subparagraph (i)]," *ibid.*, as affirmed by this Court in *Chavez* and *Giordano*, should end the analysis. This Court should put a stop to the lower courts' chronic, erroneous interpretation of the suppression remedy in subparagraph (ii).

4. To be sure, with the passage of time, the way in which law enforcement uses Title III has changed dramatically. While the drafters of the original statute primarily envisioned the surveillance of stationary targets, the vast majority of wiretap orders authorized in recent years target mobile phones (whether phone calls, text messages, or other applications). See United States Courts, *Wiretap Report 2016* (Dec. 31, 2016) <tinyurl.com/wiretap2016>; Kyle G. Grimm, *The Expanded Use of Wiretap Evidence in White-Collar Prosecutions*, 33 Pace L. Rev. 1146, 1159 n.83 (2013) (Grimm).

Technological improvements have also simplified the process of wiretapping. The Federal Bureau of Investigation (FBI) uses a sophisticated surveillance system to intercept communications through a central network, which connects the FBI's "wiretapping rooms" (*i.e.*, listening posts) in field offices and other locations across the country to switches operated by major landline, mobile, and Internet companies. See Christopher Doval et al., *The Communications Assistance for Law Enforcement*

Act: An Assessment of Policy Through Cost and Application, 32 Temp. J. Sci. Tech. & Envtl. L. 155, 168 (2013).

To the extent that "[a]dvances in wiretapping technology" may require modification of Title III's substantive provisions or its mandatory suppression remedy, however, that is fundamentally a matter that requires "congressional attention," not the intervention of this or any other court. Pet. App. 30a-31a (Lucero, J., concurring). That is particularly so because what was true in 1968 remains true today: Congress is best "situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way." *United States* v. *Jones*, 565 U.S. 400, 429-430 (2012) (Alito, J., concurring in the judgment).

In particular, the tremendous advances in technology over the last five decades—including the sophisticated wiretapping methods used in this case—only exacerbate the privacy concerns that motivated the Congress that enacted Title III. As this Court has recognized, "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by" their pre-digital analogues. *Riley* v. *California*, 134 S. Ct. 2473, 2488-2489 (2014). Mobile phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Id.* at 2484. The array of information contained on, or transmitted to and from, a typical mobile phone means that wiretaps can produce not just a record of what was said during a particular call, but "a digital record of nearly every aspect of [individuals'] lives." *Id.* at 2490.

Congress alone has the ability to weigh the competing societal interests that are affected by modern surveillance and to determine how those interests should be balanced. Indeed, Congress's history of attention to developments in technology and surveillance confirms that it is able and

willing to address the concerns of law enforcement when appropriate. For example, in amending Title III in 1986, Congress brought the statute "in line with technological developments," S. Rep. No. 541, *supra*, at 3, through the addition of the parenthetical permitting judicial authorization of a wiretap order outside of the court's territorial jurisdiction "in the case of a mobile interception device authorized by a Federal court within such jurisdiction." 18 U.S.C. 2518(3).

If the government wishes to expand the available territorial jurisdiction of wiretap orders still further, it should take the matter up through the front door by seeking a further amendment from Congress, rather than through the back door by seeking an atextual limitation on the statutory suppression remedy from this Court. Because there is no valid basis in the existing statute for the limitation the court of appeals imposed, its interpretation should be rejected.

II. EVEN IF TITLE III IMPOSED A 'CORE CONCERNS' TEST, SUPPRESSION WOULD STILL BE REQUIRED WHERE AN ORDER EXCEEDS THE JUDGE'S TERRITORIAL JURISDICTION

For the reasons given above, there is no valid basis for departing from the statute's plain text and extending the judge-made "core concerns" test to Section 2518(10)(a)(ii). The court of appeals should have enforced the statute as written and held that the wiretap evidence in petitioners' case should have been suppressed.

Even if a "core concerns" test were an additional prerequisite for suppression under Section 2518(10)(a)(ii), however, the court of appeals erred in concluding that the territorial-jurisdiction limitation does not implicate a "core concern" of Title III. That limitation advances Congress's desire to safeguard against the unwarranted use

of wiretapping by providing a functional restraint on forum shopping by prosecutors seeking wiretap authorization. Accordingly, a breach of the territorial-jurisdiction limitation is not merely a technical violation of Title III, but rather a substantive violation that directly implicates "the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Giordano*, 416 U.S. at 527.

A. The permissibility of electronic surveillance was the subject of intense national debate in the years leading up to Title III's enactment. See, *e.g.*, *Berger* v. *New York*, 388 U.S. 41, 60 (1967); Presidential Commission on Law Enforcement and the Administration of Justice, *The Challenge of Crime in a Free Society* 203 (1967) (Presidential Commission Report). Influential figures, including President Johnson, argued that electronic surveillance should be outlawed entirely, except in cases presenting grave national-security concerns. See, *e.g.*, S. Rep. No. 1097, *supra*, at 172-173.

Others took the view that the invasions of individual privacy inherent in electronic surveillance could be justified in exceptional circumstances. See, *e.g.*, Presidential Commission Report 201-203. But "even [the] most zealous advocates" of electronic surveillance recognized the need to restrict its use in order to minimize "encroachments on a man's right to privacy, * * * the most comprehensive of rights and the right most valued by civilized men." S. Rep. No. 1097, *supra*, at 170 (internal quotation marks and citation omitted). Accordingly, a presidential commission recommended that Congress enact legislation "carefully circumscrib[ing] authority" for wiretapping with the goal of "significantly reduc[ing] the incentive for, and the incidence of, improper electronic surveillance." Presidential Commission Report 203.

Mindful of the widespread concern for privacy when drafting Title III, Congress "evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications." *Giordano*, 416 U.S. at 515. Consistent with that intent, Congress required judges to play an active role in determining whether wiretap applications should be granted. See S. Rep. No. 1097, *supra*, at 91; National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, *Electronic Surveillance* 12 (1976) (National Commission Report). A judge must evaluate, *inter alia*, whether the applicant has provided sufficient information to meet the requirements of probable cause and particularity, see 18 U.S.C. 2518(1), (4); has established the necessity of wiretapping over more traditional investigative techniques, see 18 U.S.C. 2518(1); and has demonstrated that adequate measures will be taken to minimize the government's intrusion, see 18 U.S.C. 2518(5).

Moreover, unlike with a traditional search warrant, which *must* issue upon a showing of probable cause, see Fed. R. Crim. P. 41(d), Title III vests a judge with the discretion to modify the terms of requested surveillance or to reject a wiretap application entirely, regardless of whether the statute's requirements have otherwise been satisfied. See 18 U.S.C. 2518(3); S. Rep. No. 1097, *supra*, at 102. And judicial control and supervision over the surveillance process continues even after wiretap orders have been issued. See pp. 7-8, *supra*.

By mandating comprehensive judicial oversight of wiretapping, Congress ensured that "the right of privacy of our citizens will be carefully safeguarded by a scrupulous system of impartial court authorized supervision."

S. Rep. No. 1097, *supra*, at 225. But that "scrupulous system" could easily be undermined if prosecutors were free to pick a favorable judge (or pool of judges) to whom their wiretap application would be submitted. Such forum shopping would present a "substantial" danger by "circumvent[ing]" the requirement of "detached, neutral[] judicial review." National Commission Report 73; see *United States* v. *North*, 735 F.3d 212, 219 (5th Cir. 2013) (DeMoss, J., concurring).

Strict enforcement of the territorial-jurisdiction limitation restricts the ability of prosecutors to engage in forum shopping. Like the authorization requirement considered in *Chavez* and *Giordano*, the territorial-jurisdiction limitation protects privacy by "inevitably foreclos[ing] resort to wiretapping in various situations where investigative personnel would otherwise seek intercept authority from the court." *Giordano*, 416 U.S. at 528. Because the territorial-jurisdiction limitation "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device," *id.* at 527, suppression of evidence obtained from a wiretap order authorizing extraterritorial surveillance serves the "core concerns" of Title III.

B. In reaching the contrary conclusion, the court of appeals primarily relied on the supposed dearth of legislative history discussing the territorial-jurisdiction limitation. See Pet. App. 21a-22a. In particular, the court of appeals emphasized that, while the Senate report accompanying the passage of Title III identified two examples of the statute's privacy protections, the territorial-jurisdiction limitation was not one of those examples. See *id.* at 22a. The court of appeals' inference from that legislative history was mistaken.

1. To begin with, the territorial-jurisdiction limitation is expressly set out in Title III, see 18 U.S.C. 2518(3), and that express inclusion is itself an indication of the requirement's importance to Congress. Even the most ardent purposivist would hesitate before ignoring a requirement in the plain text of a statute simply because the legislative history does not expound on the centrality of the requirement to the broader statutory scheme.

The court of appeals' conclusion is especially puzzling because the limitation in question involves jurisdiction and thereby implicates a "core concern" of our entire legal system. It is axiomatic that a court may act only within its own jurisdiction. See, e.g., *Moore* v. *Mitchell*, 281 U.S. 18, 23 (1930); *Booth* v. *Clark*, 58 U.S. (17 How.) 322, 338 (1854); *Toland* v. *Sprague*, 37 U.S. (12 Pet.) 300, 329 (1838).

Consistent with that principle, a federal district court possesses extraterritorial jurisdiction to issue a search warrant only in certain exceptional circumstances. See Jennifer Daskal, *The Un-Territoriality of Data*, 125 Yale L.J. 326, 354-360 (2015). The presumption against extraterritoriality in this context is so well established that, where a statute authorizing the issuance of search warrants failed to contain a territorial limitation, one was implied. See *Weinberg* v. *United States*, 126 F.2d 1004, 1006 (2d Cir. 1942); cf. Fed. R. Crim. P. 41(b) (limiting the authority of a magistrate judge to issue a warrant outside the district in which the judge sits).

Viewed in light of the longstanding background presumption against extraterritoriality, the absence of any discussion of Title III's territorial-jurisdiction limitation in the legislative history is unremarkable. Congress could readily have thought that it was unnecessary to provide a rationale for the limitation. Congress's failure to state the

obvious when adopting the territorial-jurisdiction limitation does not diminish its importance.

More broadly, in focusing on the absence of a specific explanation for the territorial-jurisdiction limitation in the legislative history, the court of appeals overlooked the numerous references in the legislative record to the essential role that judges were intended to play *within* their respective jurisdictions. As discussed above, judicial review of wiretap applications and continued oversight of wiretap orders were considered essential to guard against the unwarranted or excessive use of electronic surveillance. See pp. 6-8. The prohibition against extraterritorial wiretap authorizations promotes that statutory purpose by limiting efforts to evade close scrutiny and oversight of questionable wiretap applications. In so doing, the territorial-jurisdiction limitation advances Congress's "core concern" of protecting individual privacy.

2. The court of appeals was equally misguided in focusing myopically on the two examples of privacy protections mentioned in Title III's legislative history. See Pet. App. 22a. In fact, Title III contains numerous provisions intended to protect privacy beyond the ones cited in the legislative history, including the requirement that law enforcement's objectives cannot be accomplished by traditional means of surveillance (the so-called "necessity" requirement), see 18 U.S.C. 2518(1)(c), and the requirement that wiretapping be carried out in a fashion that "minimize[s] the interception of communications not otherwise subject to interception" (the so-called "minimization" requirement), 18 U.S.C. 2518(5). Given the existence of those provisions, the fact that *some* of Title III's privacy protections are highlighted in the legislative history cannot plausibly signify that Title III's many other protections do not implicate a "core concern."

3. Finally, the court of appeals reasoned that the territorial-jurisdiction limitation does not implicate a "core concern" of Title III because it does not prevent forum shopping altogether: in the court's view, the government could still manipulate the system by using a "mobile interception device." Pet. App. 23a. Here again, however, the court misconstrued the statute: Title III requires that the property on which the mobile interception device is to be placed be located within the issuing court's district when interception is authorized. See *Glover*, 736 F.3d at 514.

Accordingly, Title III's reference to mobile interception devices does not provide a back-door means of engaging in nationwide surveillance. Nor was it intended to do so: Congress's limited objective in adding that reference in the 1986 amendments to Title III was to ensure the continued effectiveness of a wiretap order where "a listening device installed in a vehicle" (or on a phone fixed in the vehicle) was authorized to be placed on the vehicle within the issuing judge's jurisdiction, but the vehicle later moved outside that jurisdiction. S. Rep. No. 541, *supra*, at 30. As the government correctly acknowledges, the reference to mobile interception devices permits extraterritorial interception only in "narrow circumstances." Br. in Opp. 17.

The court of appeals further suggested that the government could circumvent the territorial-jurisdiction limitation simply by using a listening post in the issuing judge's jurisdiction. See Pet. App. 24a. Taking this case as an example, the court speculated that, "if law enforcement had wanted to obtain a wiretap order from a judge in Nebraska, law enforcement could use a listening post in Nebraska even though none of the underlying events or suspected co-conspirators bore any connection to Nebraska." *Ibid.* Even if that is theoretically true, that form of forum shopping is practically unlikely: any listening

post would need to be staffed by agents familiar with the investigation, potentially requiring the relocation of law-enforcement officials for the duration of the surveillance. In fact, the government conceded in the district-court proceedings that moving a listening post to another jurisdiction would be "logistical[ly] impractical." J.A. 67.

In any event, whether the territorial-jurisdiction limitations prevents forum shopping entirely, there can be no serious dispute that it limits it. In that respect, the territorial-jurisdiction limitation promotes Congress's desire, as expressed by Title III's chief sponsor, that the statute be "very definitely as free from loopholes as it can possibly be made." *Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. 869 (1967) (statement of Sen. McClellan).

In light of the plain text of Section 2518(10)(a)(ii), of course, this Court need not consider whether the territorial-jurisdiction limitation implicates a "core concern" of Title III. Should it reach that issue, however, the Court should conclude that it does. In either event, the Court should hold that, where a wiretap order is facially insufficient because the order exceeds the judge's territorial jurisdiction, suppression of the evidence derived from the order is required. The court of appeals' contrary conclusion cannot be sustained, and its judgments in this case should therefore be reversed.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

RICK E. BAILEY
CONLEE, SCHMIDT & EMERSON LLP
200 West Douglas Avenue, Suite 300
Wichita, KS 67202

Counsel for Petitioner Los Rovell Dahda

EDWARD K. FEHLIG, JR.
FEHLIG & FEHLIG-TATUM, LLC
3002 South Jefferson Avenue, Suite 207
St. Louis, MO 63118

Counsel for Petitioner Roosevelt Rico Dahda

KANNON K. SHANMUGAM
AMY MASON SAHARIA
ALLISON JONES RUSHING
CHARLES L. MCCLOUD
J. LIAT ROME
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

Counsel for Petitioner Los Rovell Dahda

NOVEMBER 2017

No. 17-43

In the Supreme Court of the United States

LOS ROVELL DAHDA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOHN P. CRONAN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ERIC J. FEIGIN
ZACHARY D. TRIPP
Assistants to the Solicitor General
FINNUALA K. TESSIER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether evidence obtained in conformity with the substantive requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 211, must be suppressed because the orders authorizing its interception erroneously purported also to authorize interception beyond the issuing court's territorial jurisdiction.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 1
Statement 2
Summary of argument 12
Argument 15
A. The Title III orders in this case were overbroad, not "insufficient" 16
B. Suppression is unwarranted because the mistake in the orders is not a fundamental defect 19
1. Title III requires suppression for facial errors only when they are sufficiently fundamental to prevent the government from relying on the order to conduct interception 19
2. The legal mistake in the orders here did not prevent the government from relying on them to intercept communications over the tapped phones 24
C. Any insufficiency arising from the overbreadth of the orders in this case would be severable 31
Conclusion 41
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

Aday v. *Superior Court*, 362 P.2d 47 (Cal. 1961) 34
Arizona v. *Evans*, 514 U.S. 1 (1995) 29
Davis v. *United States*, 564 U.S. 229 (2011) 29
Groh v. *Ramirez*, 540 U.S. 551 (2004) 18
Herring v. *United States*, 555 U.S. 135 (2009) 29, 36
Hudson v. *Michigan*, 547 U.S. 586 (2006) 35, 36
Illinois v. *Krull*, 480 U.S. 340 (1987) 36

Cases—Continued: Page

Murray v. *United States*, 487 U.S. 533 (1988) 33
Nix v. *Williams*, 467 U.S. 431 (1984) 33
Pennsylvania Bd. of Prob. & Parole v. *Scott*, 524 U.S. 357 (1998) 35
People v. *Defore*, 150 N.E. 585 (N.Y.), cert. denied, 270 U.S. 657 (1926) 40
Sanchez-Llamas v. *Oregon*, 548 U.S. 331 (2006) 29
Schindler Elevator Corp. v. *United States ex rel. Kirk*, 563 U.S. 401 (2011) 16
Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 30
United States v. *Barajas*, 710 F.3d 1102 (10th Cir.), cert. denied, 134 S. Ct. 230 (2013) 30
United States v. *Calandra*, 414 U.S. 338 (1974) 36
United States v. *Chavez*, 416 U.S. 562 (1974) 19, 20
United States v. *Christine*, 687 F.2d 749 (3d Cir. 1982) 34
United States v. *Cunningham*, 113 F.3d 289 (1st Cir.), cert. denied, 522 U.S. 862 (1997) 38
United States v. *Donovan*, 429 U.S. 413 (1977) ... 5, 20, 21, 26
United States v. *Giordano*, 416 U.S. 505 (1974) ..... *passim*
United States v. *Glover*, 736 F.3d 509 (D.C. Cir. 2013) 39
United States v. *Grubbs*, 547 U.S. 90 (2006) 16
United States v. *Holden*, 603 Fed. Appx. 744 (11th Cir.), cert. denied, 136 S. Ct. 522 (2015), and 136 S. Ct. 851 (2016) 38
United States v. *Houston*, 665 F.3d 991 (8th Cir.), cert. denied, 566 U.S. 1004 (2012) 29
United States v. *Jones*, 565 U.S. 400 (2012) 27
United States v. *Krueger*, 809 F.3d 1109 (10th Cir. 2015) 29

Cases—Continued: Page

United States v. *Leon*, 468 U.S. 897 (1984)..... 18, 28, 29, 36
United States v. *Lomeli*, 676 F.3d 734 (8th Cir. 2012)..... 24
United States v. *Malekzadeh*, 855 F.2d 1492 (11th Cir. 1988), cert. denied, 489 U.S. 1029 (1989)..... 30
United States v. *Moore*, 41 F.3d 370 (8th Cir. 1994)..... 38
United States v. *Ojeda Rios*, 495 U.S. 257 (1990) 28
United States v. *Pitts*, 173 F.3d 677 (8th Cir. 1999)..... 34
United States v. *Radcliff*, 331 F.3d 1153 (10th Cir.), cert. denied, 540 U.S. 973 (2003) 10, 38
United States v. *Ramirez*, 112 F.3d 849 (7th Cir.), cert. denied, 522 U.S. 892 (1997) 7, 14, 25
United States v. *Rodriguez*, 968 F.2d 130 (2d Cir.), cert. denied, 506 U.S. 847, and 506 U.S. 1023 (1992)..... 6
United States v. *Scurry*, 821 F.3d 1 (D.C. Cir. 2016)..... 5, 39
United States v. *Sells*, 463 F.3d 1148 (10th Cir. 2006), cert. denied, 549 U.S. 1229 (2007) 33, 39
United States v. *Soto-Camargo*, No. 14-cr-40129, 2015 WL 3823020 (D. Kan. June 19, 2015) 7
United States v. *Vasquez-Garcia*, No. 10-40014, 2014 WL 7359490 (D. Kan. Dec. 23, 2014)..... 7
Utah v. *Strieff*, 136 S. Ct. 2056 (2016)..... 33
Waller v. *Georgia*, 467 U.S. 39 (1984)..... 34
Wong Sun v. *United States*, 371 U.S. 471 (1963) 33

Constitution, statutes, and rule:

U.S. Const.:
Art. III, § 1..... 27
Amend. IV.....27, 28, 34, 36, 39
Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Tit. III, 82 Stat. 211 4
18 U.S.C. 2510(4) 6, 1a
18 U.S.C. 2510(12) 40, 3a

Statutes and rule—Continued: Page

18 U.S.C. 2515 ..... 8, 32, 7a
18 U.S.C. 2516 ..... 4, 15a
18 U.S.C. 2518(1) 4, 15a
18 U.S.C. 2518(1)(a) 23, 15a
18 U.S.C. 2518(1)(b)(iv) 21, 15a
18 U.S.C. 2518(3) ..... *passim*, 16a
18 U.S.C. 2518(4) 5, 6, 13, 17, 22, 23, 17a
18 U.S.C. 2518(4)(b) 5, 36, 17a
18 U.S.C. 2518(4)(d) 23, 17a
18 U.S.C. 2518(4)(e) 24, 35, 36, 18a
18 U.S.C. 2518(5) 5, 37, 18a
18 U.S.C. 2518(8)(a) 28, 21a
18 U.S.C. 2518(8)(d) 21, 22a
18 U.S.C. 2518(10)(a) 9, 19, 23, 40, 23a
18 U.S.C. 2518(10)(a)(i) 9, 13, 20, 21, 32, 38, 23a
18 U.S.C. 2518(10)(a)(ii) ..... *passim*, 23a
18 U.S.C. 2518(10)(a)(iii) 32, 23a
18 U.S.C. 2 2
21 U.S.C. 841(a)(1) 2, 3
21 U.S.C. 841(b)(1)(A) (2006 & Supp. V 2011) 2
21 U.S.C. 841(b)(1)(D) 2, 3
21 U.S.C. 843(b) 2
21 U.S.C. 846 ..... 2, 3
21 U.S.C. 856 2
21 U.S.C. 856(a)(1) 2
21 U.S.C. 856(a)(2) 2
21 U.S.C. 860 3
47 U.S.C. 1002(a)(1) 6
Fed. R. Crim. P. 52(a) 40

Miscellaneous: Page

2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (5th ed. 2012) 33, 34, 35
5 *Oxford English Dictionary* (1933) 16
S. Rep. No. 1097, 90th Cong., 2d Sess. (1968) 5, 17, 32, 33, 36
Webster's New International Dictionary (2d ed. 1958) 16
Webster's Third New International Dictionary (2002) 16, 32

In the Supreme Court of the United States

No. 17-43

LOS ROVELL DAHDA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) in petitioner Los Dahda's case is reported at 853 F.3d 1101. The opinion of the court of appeals in petitioner Roosevelt Dahda's case (Pet. App. 32a-58a) is reported at 852 F.3d 1282. The order of the district court (Pet. App. 59a-65a) is unreported.

JURISDICTION

The judgments of the court of appeals in both cases were entered on April 4, 2017. The petition for a writ of certiorari was filed on July 3, 2017, and the petition was granted on October 16, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this brief. See App., *infra*, 1a-26a.

STATEMENT

Following a jury trial in the United States District Court for the District of Kansas, petitioner Los Dahda was convicted of conspiracy to possess with intent to distribute and distribute five kilograms or more of cocaine, to manufacture, possess with intent to distribute, and distribute 1000 kilograms or more of marijuana, and to maintain drug-involved premises, in violation of 21 U.S.C. 841(a)(1), 846, 856, and 21 U.S.C. 841(b)(1)(A) (2006 & Supp. V 2011); two counts of distribution of marijuana, in violation of 21 U.S.C. 841(a)(1), (b)(1)(D), and 18 U.S.C. 2; maintenance of drug-involved premises, in violation of 21 U.S.C. 856(a)(1), (a)(2), and 18 U.S.C. 2; six counts of use of a communication facility to facilitate a drug-trafficking offense, in violation of 21 U.S.C. 843(b); three counts of possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1), (b)(1)(D), and 18 U.S.C. 2; and attempted possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1), (b)(1)(D), 846, and 18 U.S.C. 2. J.A. 68-71. He was sentenced to 189 months of imprisonment, to be followed by ten years of supervised release. J.A. 71-72. The court of appeals affirmed. Pet. App. 1a-31a.

Following the same trial, petitioner Roosevelt Dahda was convicted of conspiracy to possess with intent to distribute and distribute five kilograms or more of cocaine, to manufacture, possess with intent to distribute, and distribute 1000 kilograms or more of marijuana, and to maintain drug-involved premises, in violation of 21 U.S.C. 841(a)(1), 846, and 21 U.S.C. 841(b)(1)(A) (2006 & Supp. V 2011); five counts of use of a communication facility to facilitate a drug-trafficking offense, in violation of 21 U.S.C. 843(b); two counts of possession with intent to distribute marijuana, in violation of

21 U.S.C. 841(a)(1) and (b)(1)(D); possession with intent to distribute and distribution of marijuana within 1000 feet of a protected zone (playground), in violation of 21 U.S.C. 841(a)(1), (b)(1)(D), and 860; and attempted possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1), (b)(1)(D), and 846. J.A. 80-83. He was sentenced to 201 months of imprisonment, to be followed by ten years of supervised release. J.A. 83-85. The court of appeals affirmed. Pet. App. 32a-58a.

1. In 2006, Chad Bauman, Peter Park, and Wayne Swift began working together to distribute marijuana in Kansas. Pet. App. 3a. Petitioner Los Dahda joined the network as an importer and a dealer. *Ibid.* Among other things, he drove money from Kansas to California to buy the marijuana, helped with the purchase and packaging of marijuana in California, loaded marijuana into crates for shipment to Kansas, and sold the marijuana in Kansas to redistributors. *Id.* at 3a-4a. His twin brother, petitioner Roosevelt Dahda, assisted him in a variety of ways, including by selling "pounds of marijuana" in Kansas, picking up shipments of marijuana from the warehouse in Kansas, and transporting cash to California to pay for drugs. *Id.* at 35a-36a.

"The network operated for roughly seven years, but the relationships and work assignments varied over time." Pet. App. 4a. For example, when a dispute arose, Bauman stopped working with Park and Swift. *Ibid.* Nonetheless, petitioner Los Dahda continued to work with Bauman "to acquire marijuana in California and to transport [it] to Kansas for distribution there." *Ibid.* Approximately one year later, Los Dahda stopped working with Bauman and resumed working with Park and Swift to acquire marijuana from California and in Kansas. *Ibid.*

2. As part of its investigation into the drug network, the government submitted applications to the United States District Court for the District of Kansas for orders authorizing the interception of wire and electronic communications over cellphones used by petitioners and other suspected members of the network. See Pet. App. 14a. The government sought those orders pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 211, which "prescribes the procedure for securing judicial authority to intercept wire [oral or electronic] communications in the investigation of specified serious offenses." *United States* v. *Giordano*, 416 U.S. 505, 507 (1974). The district court issued ten orders authorizing interceptions over 11 target cellphones, five of which belonged to petitioners. See J.A. 93-178 (reproducing orders); see also J.A. 95, 103-104, 122, 131, 157 (target phones used by petitioners).

a. Title III authorizes a judge, upon a proper application from the government, 18 U.S.C. 2518(1), to issue a wiretap order "if the judge determines," among other things, that the application shows that probable cause exists that a sufficiently serious offense listed in 18 U.S.C. 2516 has been or will be committed; that probable cause exists that interception will obtain communications about that offense; and that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. 2518(3). Petitioners do not dispute that the government's applications in this case were proper, that the issuing court made the requisite judicial determinations, or that its determinations were correct.

Title III provides that an order authorizing interception over a cellphone "shall specify" (a) the target's identity, if known; (b) the target cellphone number or other unique identifier;[1] (c) the type of communications to be intercepted and the crime to which the communications relate; (d) the agency authorized to intercept the communications and the official who approved the government's application for the wiretap order; and (e) the period of time during which interception is permitted, not to exceed 30 days absent an extension. 18 U.S.C. 2518(4); see 18 U.S.C. 2518(5). Petitioners do not dispute that the orders in this case contained all of the required specifications.

b. Title III does not require that an order specify the locations where interception over a cellphone may occur. Rather than mandating that each order contain a case-specific judicial determination on that subject, the statute instead addresses the issue in its text.

Title III describes the order that a court "may enter" as "authorizing or approving interception * * * within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within

---

[1] The statute provides that an order must specify "the nature and location of the communications facilities." 18 U.S.C. 2518(4)(b). It is well-settled, and petitioners do not dispute, that the "communication[] facilit[y]" is the tapped cellphone and that its "nature and location" are given by its phone number or other unique identifier, like an international mobile subscriber identity (IMSI) number. See *United States* v. *Scurry*, 821 F.3d 1, 14-15 (D.C. Cir. 2016); S. Rep. No. 1097, 90th Cong., 2d Sess. 102-103 (1968) (Section 2518(4)(b) "requires the order to specify the phone or other communication facilities from which or the place where the authority to intercept is granted."); see also *United States* v. *Donovan*, 429 U.S. 413, 437 (1977) (this requirement was "intended to reflect what Congress perceived to be the constitutional command of particularization").

the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction)." 18 U.S.C. 2518(3). Title III defines "intercept" to include "the aural or other acquisition of the contents of any * * * communication." 18 U.S.C. 2510(4). It is undisputed that interception occurs in the place "where the tapped phones are located" or the place "where officers put their listening post." Pet. Br. 11 (quoting Pet. App. 16a-17a); *e.g.*, *United States* v. *Rodriguez*, 968 F.2d 130, 136 (2d Cir.) (where "the to-be-tapped telephone is located" or "where the contents of a wire communication are first to be heard and understood by human ears, other than those of the parties to the conversation"), cert. denied, 506 U.S. 847, and 506 U.S. 1023 (1992).

The parties here agree that interception "outside" the territorial jurisdiction of the court that issued the order, "in the case of a mobile interception device," 18 U.S.C. 2518(3), applies only when the government employs an interception device that is itself mobile, like a bug installed in a car. See Pet. App. 18a-20a.[2] Some courts have held, however, that a tapped mobile phone itself always qualifies as a "mobile interception device,"

---

[2] In practice, the government no longer uses mobile interception devices to intercept cellphone communications in Title III cases. When the government obtains a court order authorizing interception, it becomes entitled to orders mandating "technical assistance necessary to accomplish the interception." 18 U.S.C. 2518(4). And Congress has required telecommunications carriers to maintain the capability to enable law enforcement, pursuant to a court order, to intercept wire and electronic communications. 47 U.S.C. 1002(a)(1). The government now uses technical-assistance orders to have the cellular service provider transmit communications over a target phone to law enforcement, where they are first heard or read—and thus intercepted—in a wire room.

so the government may lawfully intercept communications at a wire room located outside the court's jurisdiction even when the mobile phone is also outside the court's jurisdiction. *E.g.*, *United States* v. *Ramirez*, 112 F.3d 849, 853 (7th Cir.), cert. denied, 522 U.S. 892 (1997); *United States* v. *Soto-Camargo*, No. 14-cr-40129, 2015 WL 3823020, at *2-*4 (D. Kan. June 19, 2015) (following *Ramirez*); *United States* v. *Vasquez-Garcia*, No. 10-40014, 2014 WL 7359490, at *2-*4 (D. Kan. Dec. 23, 2014) (same).

The district court that issued the orders in this case apparently adopted the latter view, which it memorialized in the orders here. Each order states:

> Pursuant to Title 18, United States Code § 2518(3), it is further Ordered that, in the event [the target cellphones] are transported outside the territorial jurisdiction of the court, interception may take place in any other jurisdiction within the United States.

E.g., J.A. 97.[3]

The orders thus authorized many interceptions that would comply with Title III, as well as some that would not. Consistent with Title III, the orders allowed interception to occur whenever a tapped cellphone was inside Kansas, the government was listening from inside Kansas, or a tapped cellphone was outside Kansas and the government was listening from outside Kansas by using a mobile interception device. The orders also, however, purported to allow interception beyond Title III's limitations, in the event a tapped cellphone was outside Kansas and the government was listening at a wire

---

[3] This same language appeared in the government's applications for the orders. *E.g.*, Los Dahda C.A. ROA Supp. Vol. IV, at 57.

room outside Kansas without using a mobile interception device.

c. For ten of the 11 tapped phones, the government listened from a wire room in Overland Park, Kansas. J.A. 46-47. It is undisputed that all of those interceptions were substantively lawful. For the remaining phone (target phone #7, belonging to Phillip Alarcon), the government listened from a wire room at the headquarters of the Drug Enforcement Administration in St. Louis, Missouri, while Alarcon was in California. J.A. 47-49. The government did not intercept any of the communications by using a mobile interception device.

3. Petitioners were indicted on multiple drug-trafficking counts, and the government subsequently sought to introduce at trial some of the interceptions "from [its] listening post in Kansas, i.e., within the jurisdiction of this issuing court." Pet. App. 68a. It did not seek to introduce any interceptions over Alarcon's phone. See *id.* at n.7 (noting that petitioners' "motion is moot as to Target Telephone 7"); J.A. 54 (district court stating that "target telephone seven is essentially moot, since the government concedes it's not going to use any of the evidence"). Petitioners filed a motion to suppress the interceptions made at the Kansas listening post, which the district court denied. Pet. App. 14a.

a. Title III provides that, "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence * * * if the disclosure of that information would be in violation of this chapter." 18 U.S.C. 2515. "What disclosures are forbidden, and are subject to motions to suppress, is in turn governed by [18 U.S.C.] 2518(10)(a)." *Giordano*, 416 U.S. at 524.

Section 2518(10)(a) states that a defendant "may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom," on the grounds that:

> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

18 U.S.C. 2518(10)(a). "If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter." *Ibid.*

b. Petitioners' suppression motion did not contend that any of the wiretap evidence used at trial, all of which was intercepted in the Kansas wire room, was "unlawfully intercepted," 18 U.S.C. 2518(10)(a)(i). Petitioners instead contended that the orders were "insufficient on [their] face," 18 U.S.C. 2518(10)(a)(ii), because they were overbroad in respect to the circumstances in which they purported to authorize interception outside Kansas, see Pet. App. 14a.

The district court referred petitioners' motion to a magistrate judge, who recommended denying it. Pet. App. 66a-76a. The magistrate judge reasoned that the inclusion of overbroad language was "academic," so long as the government's "application of the order" had complied with Title III. *Id.* at 72a-73a. "In the case at bar," he observed, "although the wiretap order *permitted* interception outside this court's jurisdiction, the government did not actually intercept cellular communications outside this court's jurisdiction" that it sought to introduce at trial. *Ibid.* The magistrate judge

accordingly recommended concluding that the orders were not "invalid on their face." *Id.* at 73a.

The magistrate judge further recommended that, if the district court were to find the orders facially insufficient, it should still deny the motion to suppress because the overbroad language was "surplusage and did not implicate Congress's core concerns in passing Title III." Pet. App. 73a; see *id.* at 74a (citing *United States* v. *Radcliff*, 331 F.3d 1153, 1162 (10th Cir.), cert. denied, 540 U.S. 973 (2003)). The magistrate judge explained that Title III's territoriality provision "does not directly and substantially implement the intent of Congress in enacting Title III," because it "does not implicate Congress's concerns for privacy and preventing the government's unauthorized use of surveillance techniques." *Id.* at 75a-76a.

The district court adopted the magistrate judge's report and recommendation, explaining that the magistrate judge had found that, "as applied, the orders did not violate the statute" because "the government did not actually intercept cellular communications outside this Court's jurisdiction." Pet. App. 64a. After a jury trial, petitioners Los Dahda and Roosevelt Dahda were convicted on 15 counts and ten counts, and sentenced to 189 months of imprisonment and 201 months of imprisonment, respectively.

4. The court of appeals affirmed in relevant part. Pet. App. 1a-58a. It rejected petitioner Los Dahda's challenge to the denial of the suppression motion, *id.* at 15a-25a, and applied that conclusion in petitioner Roosevelt Dahda's case, *id.* at 39a-40a.

The court of appeals agreed with petitioners that the orders' territoriality language reached beyond Title III's limitations, because that language permitted

interception outside Kansas even when the government was not using an interception device that was itself mobile. Pet. App. 15a-20a (disagreeing with *Ramirez*). The court then stated, without any additional analysis, that "[t]hus, the orders were facially insufficient under Title III." *Id.* at 20a.

The court of appeals determined, however, that "the facial defects" in the orders "did not require suppression." Pet. App. 25a. The court explained that, under this Court's approach in *Giordano*, *supra*, the orders did not violate one of "those statutory requirements that directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Id.* at 21a (quoting *Giordano*, 416 U.S. at 527) (brackets in original); see *ibid.* (relying on *Radcliff* to use this test when deciding whether to suppress for facial insufficiency under 18 U.S.C. 2518(10)(a)(ii)).

The court of appeals observed that "Congress's goals for Title III" included "protection of the privacy of oral and wire communications" and "establishment of a uniform basis for authorizing the interception of oral and wire communications." Pet. App. 22a. But it found that the territoriality provisions furthered neither goal. *Ibid.* The court explained that Title III's privacy protections focus on "[l]imiting who can conduct wiretaps" and "creating an evidentiary burden for a wiretap (probable cause)." *Ibid.* The court reasoned that Title III's territoriality provisions do neither of those things. *Ibid.* The court explained that they "potentially undermine uniformity by requiring prosecutors in multiple jurisdictions to coordinate about how they use electronic surveillance." *Id.* at 23a. And the court rejected

petitioners' argument "that the territorial limitation thwarts forum shopping," reasoning that even under petitioners' interpretation, "the government can forum shop by using a listening post in the preferred judge's district," and that "law enforcement has free rein on where to put the listening post." *Id.* at 23a-24a.

SUMMARY OF ARGUMENT

The court of appeals correctly refused to require the suppression of the wiretapped communications introduced in petitioners' trial, which the government lawfully intercepted in Kansas in conformity with orders of the Kansas district court and Title III's territoriality provisions. Contrary to petitioners' contentions, Title III does not require the suppression of evidence intercepted in conformity with its substantive requirements, simply because the order authorizing that interception was overbroad, in that it mistakenly purported to authorize interception in some circumstances outside the issuing court's territorial jurisdiction. Petitioners press an extreme rule under which any error in a Title III order, of any nature or magnitude, automatically mandates suppression of any and all evidence intercepted under that order, including evidence wholly unaffected by the error. That rule is flawed in multiple respects.

A. As a threshold matter, although the court of appeals described the orders here as "facially insufficient," Pet. App. 20a, its judgment can and should be affirmed on the ground that an otherwise sufficient Title III order is not "insufficient on its face," 18 U.S.C. 2518(10)(a)(ii), when it also includes language that is overbroad in part. "Insufficient" means lacking something necessary, and the orders here were not missing anything at all. It is undisputed that the orders included all of the information Title III required them to

contain. See 18 U.S.C. 2518(4). The addition of overbroad language about how the government may intercept cellphone communications outside the court's territorial jurisdiction does not detract from the court's power to authorize interceptions in Kansas in full compliance with Title III's substantive requirements.

B. Even if an overbroad order could be characterized as "insufficient," the mistake in the orders here did not render them "insufficient on [their] face" for purposes of suppression under 18 U.S.C. 2518(10)(a)(ii). This Court has held that a communication is "unlawfully intercepted" for purposes of suppression under the neighboring subparagraph, 18 U.S.C. 2518(10)(a)(i), only when the interception has transgressed one of "those statutory requirements that directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *United States* v. *Giordano*, 416 U.S. 505, 527 (1974). A similar construction should apply in determining whether an order is "insufficient on its face," a phrase Congress could not have intended to incorporate every possible technical defect that an order might exhibit.

The overbroad language here did not intrude upon any "limit [on] the *use* of intercept procedures," *Giordano*, 416 U.S. at 527 (emphasis added). Title III does not require orders to address territoriality at all, and nothing in the territoriality language here detracts from the issuing court's clear and express intent to authorize interception over the listed phones to the full extent of its authority, which includes allowing interception in Kansas. Title III's territoriality limitations also do not meaningfully protect personal privacy, because

they address only *where*, not *whether*, interception will occur. It is undisputed that the government can intercept communications over a lawfully tapped mobile phone, regardless of where the target brings it, so long as the government listens from a wire room inside the jurisdiction of the court that issued the order.

Moreover, the issuing court's error here does not even affect whether interception can lawfully occur outside the court's territorial jurisdiction. Title III expressly allows the government to intercept communications outside the court's territorial jurisdiction, so long as it uses a "mobile interception device." 18 U.S.C. 2518(3). The issuing court apparently understood that provision to permit the government to intercept at a post outside of Kansas when the phone was also outside Kansas, based on existing but ultimately incorrect case law holding that a tapped cellphone is itself a "mobile interception device." See *United States* v. *Ramirez*, 112 F.3d 849 (7th Cir.), cert. denied, 522 U.S. 892 (1997). But that is merely a mistake of statutory interpretation about the circumstances in which the government may conduct interception outside the court's jurisdiction, as Title III itself expressly allows. It has no effect on *which* communications the government could intercept, and thus has no effect on personal privacy.

C. In any event, suppression is unwarranted because all of the evidence introduced at trial in this case was lawfully intercepted inside Kansas in compliance with Title III's territoriality provisions. Title III does not require courts to suppress all evidence when an order is "insufficient on its face" in only some of its applications and those applications are not relevant to the evidence to be used at trial. Congress designed Title III's suppression remedy for statutory violations to be no

broader than the exclusionary rule for constitutional violations. And following this Court's guidance, the courts of appeals have uniformly concluded that when a warrant is invalid in only some of its applications, suppression should extend only to evidence that results from that defect—not to evidence that was lawfully obtained under valid applications of the same warrant. Nothing in Title III suggests application of a broader rule, under which courts would be required to exclude probative evidence of guilt whose interception was not the result of any statutory or constitutional error.

ARGUMENT

All of the wiretapped communications the government introduced at trial here were intercepted in Kansas pursuant to orders of the Kansas district court authorizing such interception to occur. It is accordingly undisputed that all of that evidence was lawfully intercepted in conformity with Title III and its territoriality provisions. In urging that this evidence nonetheless should be suppressed, petitioners take the extreme view that (1) an otherwise sufficient order that also includes overbroad language can be deemed "insufficient on its face" to authorize interception, 18 U.S.C. 2518(10)(a)(ii), see Pet. Br. 22; (2) any error in an order, no matter how minor, renders the order per se "insufficient on its face," *ibid.*; and (3) an error that renders an order "insufficient" for purposes of some interceptions requires suppression of all interceptions, see Pet. Br. 23. None of those propositions is correct—let alone all of them.

A. The Title III Orders In This Case Were Overbroad, Not "Insufficient"

Title III's text makes clear that the orders here, which included everything necessary for the government to intercept communications, were not "*insufficient* on [their] face" simply because they *also* included an unnecessary paragraph reflecting a mistaken interpretation of the circumstances in which Title III permits interception outside Kansas. Although the court of appeals, without analysis, accepted the proposition that this overbreadth made these orders insufficient, Pet. App. 20a, the government has consistently maintained otherwise, including at the certiorari stage in this Court. See Br. in Opp. 21-22. That issue is logically antecedent to the question presented, necessary to its consideration, and dispositive of this case. See *United States* v. *Grubbs*, 547 U.S. 90, 94 & n.1 (2006) (resolving "antecedent" issue necessary to "'an intelligent resolution of the question presented'") (citation omitted); Pet. Br. 21-23 (addressing insufficiency issue).

1. As petitioners recognize, "[b]ecause Title III does not define the phrase 'insufficient on its face,' the Court should 'look first to the [phrase's] ordinary meaning.'" Pet. Br. 22 (quoting *Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 563 U.S. 401, 407 (2011)) (brackets in original). Both at the time of Title III's passage and today, the word "insufficient" has ordinarily meant "[d]eficient in force, quality, or amount; lacking in what is necessary or requisite; inadequate." 5 *Oxford English Dictionary* 359 (1933); see *Webster's Third New International Dictionary* 1172 (2002) (*Webster's Third*) ("inadequate to some implied or designated need, use, or purpose"); *Webster's New International Dictionary*

1288 (2d ed. 1958) (similar). An order thus is "insufficient on its face" if its face shows that it is lacking something necessary to allow the government to rely on that order to conduct interception.

The orders here are not "insufficient" to authorize interception, because they are not missing anything that the statute requires. Title III defines, in 18 U.S.C. 2518(4), the information that an order must contain in order for it to authorize interception. To authorize interception over a cellphone, an order "shall specify," among other things, the target's identity, cellphone number or other unique identifier, the suspected offense, the type of communications sought to be intercepted, and the period in which interception is permitted. *Ibid.*; see S. Rep. No. 1097, 90th Cong., 2d Sess. 102 (1968) (Senate Report) ("Subparagraph (4) sets out * * * the requirements that each order authorizing or approving the interception of wire or oral communications must meet."). It is undisputed that the orders here contain all of the necessary information. See J.A. 93-178 (reproducing orders).

Section 2518(4) does not require an order to say anything about the places where interception over a cellphone is authorized. Rather, the statute itself provides territoriality rules that every order incorporates by default and need not repeat: A court "may enter" an order "authorizing or approving interception * * * within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction)." 18 U.S.C. 2518(3). In contrast to the sort of information that each order is required to contain—such as the official who approved the application, the phones

to be targeted, or the duration of interception—that territorial scope is inherent and is not presumed to vary in each case.

2. Petitioners do not dispute that the Title III orders in this case would be sufficient if the paragraph on territoriality did not appear at all. The court's addition of language restating the territorial limitations inherent in the statute, as the court understood them, did not make the orders "insufficient." Adding *more* usually does not give an order *less* of something necessary, so as to render it "insufficient." To the extent such a scenario might arise, it would be limited to situations in which the addition itself illustrates that something necessary is missing. Cf. *United States* v. *Leon*, 468 U.S. 897, 923 (1984) ("[D]epending on the circumstances of the particular case, a warrant may be so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid."); see also *Groh* v. *Ramirez*, 540 U.S. 551, 558 (2004) (similar).

This case, however, presents no such circumstance. Nothing on the face of the orders here marked them as "insufficient" to confer upon law enforcement the full interception authority that Title III allows. An officer would be notified of the various case-specific determinations that the issuing court was required to make to authorize interception—*e.g.*, what phones would be tapped, how long interception could last. It is undisputed that those determinations here satisfied Title III and the constitutional requirement of particularization. And an officer executing the order would have no reason to believe that the issuing court had failed to take one of the steps necessary to approve interception. Indeed, it is undisputed that the court here did, in fact, take each

of the necessary steps and thus authorized interception to the full extent of Title III's territorial scope. Its orders were in no way "insufficient."

B. Suppression Is Unwarranted Because The Mistake In The Orders Is Not A Fundamental Defect

Even assuming that some overbroad orders could be considered "insufficient on [their] face," the orders here should not be. Only a defect that renders an order so deficient on its face that the government cannot rely on it to intercept communications can render an order "insufficient on its face" for purposes of the suppression remedy. The colorable mistake of statutory interpretation reflected in these orders does not rise to that level.

1. Title III requires suppression for facial errors only when they are sufficiently fundamental to prevent the government from relying on the order to conduct interception

The suppression remedy in 18 U.S.C. 2518(10)(a) provides that a defendant "may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom," on the grounds that (i) "the communication was unlawfully intercepted"; (ii) "the order of authorization or approval under which it was intercepted is insufficient on its face"; or (iii) "the interception was not made in conformity with the order of authorization or approval." *Ibid.* This Court's decisions addressing that provision illustrate that its terms should not be construed so broadly as to require suppression for every conceivable defect.

a. In the companion cases of *United States* v. *Giordano*, 416 U.S. 505 (1974), and *United States* v. *Chavez*, 416 U.S. 562 (1974), the Court distinguished two

types of Title III violations upon which the defendants in those cases had moved to suppress communications as "unlawfully intercepted" under subparagraph (i). In *Giordano*, the Court held that suppression was required when an improper official (the Attorney General's executive assistant) had approved the government's application for a Title III order. 416 U.S. at 508-509. In *Chavez*, by contrast, the Court held that suppression was *not* required when the government's application had been approved by a proper official, but it incorrectly identified a different official as the approver. 416 U.S. at 570.

In distinguishing the cases, the Court explained that a statutory violation renders a communication "unlawfully intercepted" for purposes of suppression under 18 U.S.C. 2518(10)(a)(i) only if its interception conflicts with "those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Giordano*, 416 U.S. at 527; *Chavez*, 416 U.S. at 575 (same). The Court found in *Giordano* that Title III's requirement that wiretap applications be authorized only by certain officials "responsive to the political process" was a "critical precondition" to any judicial order. 416 U.S. at 516, 520. By contrast, the Court found in *Chavez* that Title III's requirements that the authorizing official be *identified* in the wiretap application and order merely serve a "reporting function" and were not intended, "by themselves, to occupy a central, or even functional, role in guarding against unwarranted use" of wiretaps. 416 U.S. at 578-579.

The Court subsequently applied the same principles in *United States* v. *Donovan*, 429 U.S. 413 (1977), to

hold that suppression was not required based on a violation of Title III's requirements that the government identify "all those likely to be overheard" in applying for a wiretap and later inform the court "of all identifiable persons whose conversations were intercepted" under an order that the court issued. *Id.* at 435, 438; see *id.* at 434-439; see also 18 U.S.C. 2518(1)(b)(iv) and (8)(d). The Court explained that "[i]n no meaningful sense can it be said that the presence of that information as to additional targets would have precluded judicial authorization of the intercept." 429 U.S. at 436.

Although *Donovan*, *Giordano*, and *Chavez* focused on whether a communication was "unlawfully intercepted" so as to warrant suppression under 18 U.S.C. 2518(10)(a)(i), their limiting construction also informs whether an order is "insufficient on its face," so as to warrant suppression under 18 U.S.C. 2518(10)(a)(ii). Given this Court's construction of subparagraph (i) to reach only statutory violations that are sufficiently important to warrant suppression, it would be incongruous to construe suppression under neighboring subparagraph (ii) as mandatory for any facial error in the order, irrespective of its effect, nature, or magnitude. *Chavez* and *Donovan* illustrate that Congress countenanced the admission of at least some evidence that was *actually* intercepted in violation of Title III's statutory requirements. It is unlikely that Congress in its next breath enacted a provision so broad as to require suppression in every circumstance, no matter what—even of evidence that was lawfully intercepted within the issuing court's territorial jurisdiction. Rather, the two subparagraphs are naturally interpreted together to require suppression only for a limited category of errors

that are sufficiently serious to justify the extreme costs of suppression.

Accordingly, when a court is tasked with determining whether a defect apparent on the face of an order renders it "insufficient" notwithstanding that Congress did not itself make that information a prerequisite to conducting interception, see 18 U.S.C. 2518(4), a court must look to the nature and severity of the statutory violation in relation to the purpose of Title III's suppression remedy. As a prerequisite to such an extreme sanction, the court must, as this Court did in *Giordano*, examine whether the statutory requirement that was violated "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Giordano*, 416 U.S. at 527.

b. Petitioners object (Br. 16) to relying on the *Giordano* test in construing suppression for facial insufficiency under subparagraph (ii). In their view, only subparagraph (i) is limited to fundamental defects, while subparagraph (ii) sets forth a blanket rule of suppression applicable whenever any defect of any sort is apparent on an order's face. But for the reasons set forth above, that view is mistaken as a matter of the statutory text and context: The statute says "insufficient on its face," 18 U.S.C. 2518(10)(a)(ii), not "imperfect on its face" or "invalid on its face in any respect." Petitioners' view would also lead to suppression in circumstances where it is pointless, and grant greater rights to defendants with claims of minor technical defects in the language of an order than to those with claims that evidence was actually intercepted in violation of Title III.

Petitioners err in their specific contention (Br. 16) that interpreting subparagraphs (i) and (ii) to contain the same overarching limitation would conflict with *Giordano*. The government argued in *Giordano* that, in order to avoid rendering the other subparagraphs of Section 2518(10)(a) surplusage, subparagraph (i)'s suppression remedy for "unlawfully intercepted" communications should apply only in the case of constitutional violations. 416 U.S. at 525-526. The Court considered that argument to have "substance," but declined to adopt the government's limiting construction. *Id.* at 527. The Court instead reasoned that no superfluity would exist under a construction of subparagraph (i) as applying only to violations of statutory requirements that "directly and substantially * * * limit the use of intercept procedures to those situations clearly calling for" such procedures. *Ibid.*

Contrary to petitioners' assertion, taking those same considerations into account under subparagraph (ii) would not make that subparagraph superfluous. As a threshold matter, those considerations are relevant only in some (not all) subparagraph (ii) cases—namely, those in which a defendant claims that all of the evidence intercepted under an order must be suppressed due to some facial defect, notwithstanding that Congress did not itself make that information a prerequisite to conducting interception, see 18 U.S.C. 2518(4).

Subparagraph thus (ii) would still, for example, require suppression if the order and any accompanying materials entirely failed to identify the individual who approved the application, in violation of 18 U.S.C. 2518(1)(a) and (4)(d)—even if the application was actually approved by the Attorney General or other appro-

priate official and therefore suppression was not warranted under subparagraph (i). See *Giordano*, 416 U.S. at 525 n.14 (contrasting an "erroneous[]" identification of the official with the failure to identify the official); *United States* v. *Lomeli*, 676 F.3d 734, 742 (8th Cir. 2012) (affirming grant of motions to suppress where official not identified in order or its attachments). Suppression under subparagraph (ii), but not the other subparagraphs, would likewise be required if a judge issued an otherwise valid order but, before it was issued, a clerk mistakenly deleted the time limitations that the judge had intended to impose. Although the judge would have respected the relevant requirements of the statute, and ensuing interception would fit within the four corners of the order, the absence of a required limitation would nevertheless make the order "insufficient on its face" for purposes of suppression. See 18 U.S.C. 2518(4)(e) (an order "shall specify" the "period of time during which such interception is authorized").

2. The legal mistake in the orders here did not prevent the government from relying on them to intercept communications over the tapped phones

The court of appeals conducted the correct inquiry, which it referred to as the "core concerns" inquiry, in affirming the denial of petitioners' suppression motion here. Pet. App. 21a-25a. Although it did not locate the textual basis for its inquiry in the term "insufficient," its analysis was nonetheless the same one that the text, as interpreted through the lens of this Court's decisions, would require. See pp. 19-24, *supra*. And the court correctly recognized (Pet. App. 21a-25a) that the territorial language in the orders here does not require suppression.

The addition of that language to the orders here does not interfere with personal privacy because it is undisputed that the issuing court properly authorized interception to occur and the error did not expose any additional communications to the potential for government eavesdropping. All the same communications could be lawfully intercepted with or without the error. The language simply related to *where* government agents had to be located when intercepting those communications. Title III expressly authorizes interception outside a court's territorial jurisdiction when the government uses a "mobile interception device." 18 U.S.C. 2518(3). The court simply made a reasonable mistake of statutory interpretation in understanding the phrase, which Title III does not define. That mistake does not warrant suppression.

a. The territoriality language included in the orders here did not reflect the violation of any provision that "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device," *Giordano*, 416 U.S. at 527. The language reflected the issuing court's view—in accord with the Seventh Circuit, see *United States* v. *Ramirez*, 112 F.3d 849, 853, cert. denied, 522 U.S. 892 (1997)—that Title III permitted interception to occur wholly outside Kansas because a tapped mobile phone is a "mobile interception device." The government defended that position below, but now acknowledges that the position—which the court of appeals rejected for the first time in this case, see Pet. App. 18a-20a—is incorrect. But the validity of that interpretation in the Tenth Circuit was an open ques-

tion at the time the orders were issued and the interception here occurred. *Ibid.* The issuing court's legal mistake, on an unsettled issue of law about an undefined term in a statute, does not relate to whether interception was justified.

Indeed, the judge was willing to approve interception to the furthest reaches he viewed the law to allow. The government could and would have obtained an order authorizing the interception of all the wiretap evidence it introduced in this case irrespective of the judge's error. As in *Donovan*, "[i]n no meaningful sense can it be said that the presence of [additional] information"—here, the correct interpretation of the statute—"would have precluded judicial authorization of the intercept," 429 U.S. at 436.

b. Even if the error here were viewed to implicate the substantive territorial limitations of Title III, rather than simply the language in a judicial wiretap order, it would still have no bearing on whether the circumstances of the case "clearly call[ed] for the employment" of interception. *Giordano*, 416 U.S. at 527.

Title III's territoriality provisions do not give any individual any meaningful protection for personal privacy. It is undisputed that, once a court issues an order authorizing interception, the government can lawfully intercept all the communications over the target mobile phone—regardless of where the target takes it—so long as the government's listening post is located within the court's territorial jurisdiction. Pet. App. 23a-24a. Title III's territoriality provisions thus do not protect any of the target's communications from the potential for lawful interception. While a target is likely to care *whether* government agents are listening to his communications,

he is unlikely to care much if at all about *where* the government agents are sitting when they do so.

Moreover, Title III's territoriality restrictions do not even require the intercepting government agents always to be sitting inside the court's territorial jurisdiction in order to intercept communications outside that area. Title III allows the government to intercept such communications when both the phone *and* the government's listening post are outside the court's jurisdiction, so long as the government uses a "mobile interception device." 18 U.S.C. 2518(3). In practice, the government no longer uses mobile interception devices to intercept cellphone communications. See p. 6 n.2, *supra*. But the orders here lawfully authorized the government to do so, and thus to intercept the same communications from outside the court's territorial jurisdiction. And it is difficult to see how the orders here invaded privacy to a greater degree by allowing the government to intercept the same communications at a wire room in Missouri, rather than through using the more invasive means of installing some kind of interception device on the target phones themselves. Cf. *United States* v. *Jones*, 565 U.S. 400, 404-405 (2012) (relying on common-law trespass principles to hold that the Fourth Amendment requires a warrant for the physical installation of a GPS tracker on a car).

c. Petitioners contend (Br. 37-38) that, because "[i]t is axiomatic that a court may act only within its own jurisdiction," the issuing court here necessarily must have violated a core concern of the statute. The axiom is correct, but petitioners' corollary conclusion does not follow. Congress defines the jurisdiction of the lower federal courts through positive law. See U.S. Const. Art. III, § 1. And in Title III, Congress expressly allowed

district courts to authorize the government to intercept communications outside the court's territorial jurisdiction, if the government uses a "mobile interception device." 18 U.S.C. 2518(3). The orders here omitted that last qualifier (that the government must use a mobile interception device) apparently based on a misunderstanding that the tapped mobile phone itself qualified as a "mobile interception device." The issuing court's error here was thus not a violation of axiomatic jurisdictional principles, but a more mundane mistake of statutory interpretation on a contestable issue.

The principles of law applicable to *that* kind of error strongly disfavor suppression. In *United States* v. *Ojeda Rios*, 495 U.S. 257 (1990), this Court held that a mistake of statutory interpretation by the government that was "objectively reasonable at the time" did not require suppression—even under a different provision of Title III with an "explicit exclusionary remedy" mandating suppression whenever the government failed to comply with a statutory requirement to seal intercepted communications. *Id.* at 260, 266-267; see 18 U.S.C. 2518(8)(a) (compliance "shall be a prerequisite for the use or disclosure" of intercepted communications at trial). It would be anomalous to interpret the general Title III suppression remedy at issue here nonetheless to require suppression in similar circumstances.

More broadly, Title III's suppression remedy for interception conducted pursuant to an order that is "insufficient on its face" can readily be analogized to the suppression remedy for "facially deficient" warrants in the Fourth Amendment context, *Leon*, 468 U.S. at 923. And in that context, a search pursuant to a warrant issued in excess of the court's jurisdiction would gener-

ally not result in suppression "if the police acted 'in objectively reasonable reliance'" on that warrant, *Herring* v. *United States*, 555 U.S. 135, 142 (2009) (quoting *Leon*, 468 U.S. at 922), or if the "heavy costs" of suppression "outweigh" its "deterrence benefits," *Davis* v. *United States*, 564 U.S. 229, 237 (2011). Cf. *Herring*, 555 U.S. at 136-138 (no suppression following an arrest made in reasonable reliance on a police database showing an outstanding arrest warrant, where another police employee had negligently failed to update the database to show that the warrant no longer existed); *Arizona* v. *Evans*, 514 U.S. 1, 11-16 (1995) (similar, where mistaken judicial records failed to show that the warrant no longer existed).

Courts have treated mistakes about territoriality the same way, suppressing evidence when, among other things, the error was obvious and the officer should have known that the warrant was issued in excess of the court's jurisdiction, *e.g.*, *United States* v. *Krueger*, 809 F.3d 1109, 1113 (10th Cir. 2015); see *id.* at 1126 (Gorsuch, J. concurring), but have declined to suppress evidence when the error was *not* obvious, and in particular when the question was unsettled, *e.g.*, *United States* v. *Houston*, 665 F.3d 991, 996 (8th Cir.) (declining to impose "a duty on officers exercising a search warrant obtained without deceit" to know "the legal and jurisdictional limits of a judge's power to issue interstate search warrants"), cert. denied, 566 U.S. 1004 (2012).[4]

---

[4] The government has argued that violations of a statute or rule (rather than a constitutional provision) do not warrant suppression under the exclusionary rule. See *Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 348 (2006). Although Title III itself imposes a statutory suppression remedy, that principle counsels against pressing any

The government has long argued that Title III's suppression remedy incorporates a good-faith exception. See *United States* v. *Malekzadeh*, 855 F.2d 1492, 1497 (11th Cir. 1988), cert. denied, 489 U.S. 1029 (1989). But whether or not it does, see *United States* v. *Barajas*, 710 F.3d 1102, 1110 & n.4 (10th Cir.) (noting circuit conflict on the good-faith issue), cert. denied, 134 S. Ct. 230 (2013), it is still difficult to see why Congress would have intended suppression in the circumstances here.

Petitioners provide no practical reason why Congress would have intended an error of the sort at issue here to require suppression. Petitioners suggest (Br. 36) that Congress intended Title III's territoriality provisions to "restrict[] the ability of prosecutors to engage in forum shopping." But the court of appeals correctly rejected that contention, because Title III's limitations "do[] not prevent forum shopping" at all. Pet. App. 23a. Even under petitioners' interpretation, it is undisputed that "the government can forum shop by using a listening post in the preferred judge's district," and "law enforcement has free rein on where to put the listening post." *Id.* at 24a.

The mere characterization of an error as "jurisdictional" in nature also does not suggest that suppression is required. Cf. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (noting that "'[j]urisdiction' * * * is a word of many, too many, meanings") (citation omitted). The error here relates to what qualifies as a "mobile interception device" that the government may permissibly use to conduct electronic surveillance outside of the district, not to the bedrock authority of a court to act. Petitioners would presumably agree that the orders

---

suppression remedy beyond what Congress has unequivocally required.

here would have been sufficient had the issuing court mistakenly viewed the "jurisdictional" scope of its territorial authority too *narrowly*—say, by including in the orders a reading of the statute as altogether foreclosing interception when the tapped cellphone was outside of Kansas. It would be anomalous nonetheless to label the orders here, which the court clearly intended to reach as far as the statute allowed, as "insufficient" to authorize interception in Kansas consistent with Title III.

C. Any Insufficiency Arising From The Overbreadth Of The Orders In This Case Would Be Severable

Even if the overbroad language rendered the orders here "insufficient on [their] face" in some applications, it would not render them "insufficient on [their] face" in all of them. Rather, the communications used at trial here were intercepted in Kansas pursuant to valid applications of the orders and are readily severable from any potential invalid applications. And Title III does not require suppression of evidence that—like the evidence at issue here—was intercepted without reliance on any legal error that an order might contain. The government would have lawfully intercepted the same evidence it used at trial in the same place at the same time, with or without the erroneous paragraph in the orders. Suppression accordingly is unwarranted. See Pet. App. 72a (concluding that any overbreadth was "academic" to the admissibility of the evidence intercepted in Kansas and used at trial).

1. Nothing in Title III suggests that Congress intended to enact a blanket suppression remedy that would dispense with traditional fruit-of-the-poisonous-tree analysis. To the contrary, Congress focused the admissibility inquiry on the propriety of disclosing the actual evidence used at trial, not on hypothetical issues

that might have arisen if the government had sought to use different evidence at trial.

The statute provides that, when wire or oral communications have been intercepted, "no *part* of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial" if "the disclosure *of that information* would be in violation of this chapter." 18 U.S.C. 2515 (emphases added). Similarly, subparagraphs (i) and (iii) of Section 2518(10)(a) permit a motion "to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom," when "*the communication* was unlawfully intercepted" or "*the interception* was not made in conformity with the order of authorization or approval." 18 U.S.C. 2518(10)(a)(i) and (iii) (emphases added).

Subparagraph (ii), in turn, authorizes suppression only when "the order of authorization or approval under which" a communication was intercepted "is insufficient on its face." 18 U.S.C. 2518(10)(a)(ii). An order can be "insufficient"—*i.e.*, "inadequate to *some* implied or designated need, use, or purpose"—without being "inadequate to" *every* "implied or designated need, use, or purpose." *Webster's Third* 1172 (emphasis added). Had Congress intended a blanket suppression remedy that would apply to any evidence intercepted under any order that was deficient in any respect, regardless of the relationship between the deficiency and the evidence, it would have said so more clearly. And the Senate Report accompanying Title III's enactment confirms that Title III's suppression remedy was intended to deny the government only the "fruits of [its] unlawful actions." Senate Report 69; see *Giordano*, 416 U.S. at 528-529 (looking to this report).

2. Congress had no intent "to press the scope of the suppression role beyond present search and seizure law." Senate Report 96. And under both then-existing and current search and seizure law, suppression is not justified in the absence of a sufficient "causal relationship between the unconstitutional act and the discovery of evidence." *Utah* v. *Strieff*, 136 S. Ct. 2056, 2061 (2016). For example, under the "independent source" doctrine, courts may "admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source." *Ibid.* (citing *Murray* v. *United States*, 487 U.S. 533, 537 (1988)). Under the "inevitable discovery" doctrine, courts may admit "evidence that would have been discovered even without the unconstitutional source." *Ibid.* (citing *Nix* v. *Williams*, 467 U.S. 431, 443-444 (1984)). And under the "attenuation doctrine," courts may admit evidence "when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance," such that suppression is no longer warranted. *Ibid.*; see *Wong Sun* v. *United States*, 371 U.S. 471 (1963); see also Senate Report 96 (stating that Congress had "no intention to change the attenuation rule" when it enacted Title III).

Both before and after Congress enacted Title III, the lower courts have recognized "severance"—also known as "partial invalidity," "partial suppression," or "redaction"—as an additional application of similar causation principles. See *United States* v. *Sells*, 463 F.3d 1148, 1150 n.1 (10th Cir. 2006) (collecting cases from every circuit), cert. denied, 549 U.S. 1229 (2007); 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.6(f) (5th ed. 2012) (LaFave). Under that doctrine, when a traditional

search warrant satisfies either the Fourth Amendment's particularity or probable cause requirements only in part, courts need not suppress *all* the evidence obtained pursuant to the warrant. Rather, if the valid and invalid applications can be severed, courts may admit the evidence obtained under valid applications of the warrant, and suppress only the evidence "seized under the authority" of the parts that are invalid. *United States* v. *Christine*, 687 F.2d 749, 754 (3d Cir. 1982); *Aday* v. *Superior Court*, 362 P.2d 47, 52 (Cal. 1961); LaFave § 4.6(f), at 814-815 (describing *Aday* as the "leading case" and stating that its rule "is sound"); cf. *Waller* v. *Georgia*, 467 U.S. 39, 43 n.3 (1984) (rejecting suppression remedy for validly seized items where police also made invalid seizures in warrant-authorized search).[5] For example, if a warrant authorizes the search of two apartments, but probable cause was lacking as to one, any suppression remedy would be limited to that apartment. See, *e.g.*, *United States* v. *Pitts*, 173 F.3d 677, 679-681 (8th Cir. 1999).

The severance doctrine's underlying rationale is that "it would be harsh medicine indeed if a warrant issued on probable cause and particularly describing certain items were to be invalidated in toto merely because the affiant and magistrate erred in seeking and permitting a search for other items as well." LaFave § 4.6(f), at 815. And that rationale translates with full force to

---

[5] Courts acknowledge that severability might be inappropriate where officers "abuse * * * the warrant procedure" by obtaining a warrant "essentially general in character" that nevertheless "meet[s] the requirement of particularity" in respect to certain "minor items." LaFave § 4.6(f), at 814 (quoting *Aday*, 362 P.2d at 52). Here, however, the orders satisfied all particularity requirements and were capable of myriad valid applications.

Title III. When a defect in a Title III order (*e.g.*, the omission of a time limit for interception, see 18 U.S.C. 2518(4)(e)) renders it "insufficient on its face" in all of its applications (because it categorically lacks a necessary privacy-protecting judicial determination), then all evidence obtained pursuant to that order is the fruit of the violation and may potentially be suppressed.[6] But if a defect causes an order to be "insufficient on its face" in only *some* of its applications and they can be severed, then only the evidence intercepted pursuant to the invalid applications would be subject to suppression, and the untainted evidence should be admitted into evidence. Cf. LaFave § 4.6(f), at 816 ("When [a] warrant's fault is not so pervasive," the objective of deterrence "may be served in the same way and to the same degree by limiting suppression to the fruits of the warrant's unconstitutional component.").

3. The "grave adverse consequence that exclusion of relevant incriminating evidence always entails," *Hudson* v. *Michigan*, 547 U.S. 586, 595 (2006), makes it especially unlikely that Congress intended suppression of evidence when its interception lacked a causal connection to a statutory or constitutional violation. "Quite apart from the requirement of unattenuated causation, the exclusionary rule has never been applied except 'where its deterrence benefits outweigh its substantial social costs.'" *Id.* at 594 (quoting *Pennsylvania Bd. of Prob. & Parole* v. *Scott*, 524 U.S. 357, 363 (1998)). Noth-

---

[6] Even in the case of a facial invalidity, suppression might not be warranted if the officer acted in good faith reliance on the Title III order. See p. 30, *supra* (noting circuit conflict on this issue). The government did not rely on a good faith argument below and accordingly does not press one in this Court.

ing suggests that Congress intended Title III's suppression remedy, which was meant to mirror the Fourth Amendment's, see Senate Report 96, to apply in situations where it would serve no significant purpose.

This Court has explained that the constitutional suppression remedy is designed to "safeguard Fourth Amendment rights generally through its deterrent effect." *Leon*, 468 U.S. at 906 (quoting *United States* v. *Calandra*, 414 U.S. 338, 348 (1974)). Suppression is an "extreme sanction," *id.* at 916, that "always entails" significant societal costs, *Hudson*, 547 U.S. at 595. Most obviously, it can allow "guilty and possibly dangerous defendants [to] go free—something that 'offends basic concepts of the criminal justice system.'" *Herring*, 555 U.S. at 141 (quoting *Leon*, 468 U.S. at 908). Accordingly, the Court has found suppression warranted only where its "remedial purpose" is "effectively advanced" and the benefits of deterrence outweigh suppression's "'substantial social costs.'" *Illinois* v. *Krull*, 480 U.S. 340, 347, 352 (1987) (quoting *Leon*, 468 U.S. at 907).

Petitioners' all-or-nothing approach to suppression would contravene those fundamental principles by mandating suppression of evidence without a causal link to the underlying illegality, without an apparent justification, and where Title III already provides an adequate deterrent. For example, Congress provided that a wiretap order must identify the target phones. See 18 U.S.C. 2518(4)(b); p. 5 n.1, *supra*. If a court issued an otherwise valid order that properly identified ten cellphones to be tapped, but also purported to authorize interception over an eleventh cellphone ("target phone 11") without giving a phone number or other unique identifier at all, the order would be "insufficient on its face" to support interception from the unidentified line,

18 U.S.C. 2518(10)(a)(ii). But in the absence of severance, a court would be required to suppress evidence intercepted not only over the unidentified cellphone, but also over all the properly identified phones mentioned in the same order—notwithstanding that the order was sufficient to authorize interception over those ten lines and that interception was entirely lawful.

Similarly, Congress provided that interception cannot last more than 30 days, starting from the earlier of the day interception begins or the expiration of a 10-day grace period after the order is entered. 18 U.S.C. 2518(5). Accordingly, interception always must end by day 40 (the 10-day grace period plus 30 days). If a court authorized interception for 30 days beginning from the date interceptions commence but omitted the requirement than the clock automatically start after 10 days, and the government did not begin interception until day 15, then the government of course could not use evidence intercepted from days 41 through 45: Under Title III's plain terms, the order would have already expired. *Ibid.* In the absence of severance, however, a court also would be required to suppress evidence intercepted from days 15 through 40—notwithstanding that the order on its face validly authorized that interception. Nothing in Title III mandates such a counterproductive result.

4. No decision of this Court or any court of appeals has adopted a "harsh medicine" rule under which any insufficiency in a Title III order would automatically require suppression of all evidence intercepted under it.

The only decision in which this Court has required suppression of Title III evidence was *Giordano*. But *Giordano*'s conclusion that "suppression must follow" when evidence used at trial was *in fact* "unlawfully

intercepted" within the meaning of 18 U.S.C. 2518(10)(a)(i), 416 U.S. at 528, does not aid petitioners here. The statutory error at issue in *Giordano* was an overarching one that tainted all of the evidence the government had intercepted—namely, that no appropriate official in the Executive Branch had approved the government's application for the Title III order that had authorized the interceptions that the government sought to introduce. See *id.* at 508-509. The Court did not suggest that, in circumstances in which a statutory violation tainted the interception of only *some* evidence, Title III would require suppression of untainted evidence as well.

Every court of appeals that has considered the issue has rejected a rule that would require suppression of lawfully intercepted evidence whenever any kind of defect whatsoever is apparent on the face of an order, without regard to its significance or bearing on interception of the evidence at issue. See *United States* v. *Moore*, 41 F.3d 370, 374 (8th Cir. 1994) ("[E]very circuit to consider the question has held that § 2518(10)(a)(ii) does not require suppression if the facial insufficiency of the wiretap order is no more than a technical defect."); see also *United States* v. *Radcliff*, 331 F.3d 1153, 1155 (10th Cir.) (no suppression when "merely a technical defect"), cert. denied, 540 U.S. 973 (2003); *United States* v. *Cunningham*, 113 F.3d 289, 293-294 (1st Cir.) (no suppression of order "identif[ying] place and type" of communications to be intercepted "in a confusing language," where "the judge and the executing officer knew what had [actually] been proposed and authorized"), cert. denied, 522 U.S. 862 (1997); *United States* v. *Holden*, 603 Fed. Appx. 744, 749 (11th Cir.) (per curiam) ("[F]acial insufficiency * * * that amounts to a

mere technical defect need not result in suppression."), cert. denied, 136 S. Ct. 522 (2015), and 136 S. Ct. 851 (2016). Furthermore, as noted above, every circuit follows the severance doctrine in the Fourth Amendment context. See *Sells*, 463 F.3d at 1150 n.1.

The one circuit decision on which petitioners rely, *United States* v. *Glover*, 736 F.3d 509 (D.C. Cir. 2013), likewise does not embrace petitioners' sweeping and all-or-nothing approach. The court of appeals in *Glover* required suppression only of evidence that it concluded had actually been intercepted in violation of Title III. See *id.* at 513-515. And although the court stated that "subparagraph (ii) creates a 'mechanical test' under which 'suppression is the mandatory remedy,'" Pet. Br. 23 (brackets omitted) (quoting *Glover*, 736 F.3d at 513), subsequent decisions have clarified that it "left open the possibility" that a "technical defect" in an interception order might not require suppression, *United States* v. *Scurry*, 821 F.3d 1, 12 (D.C. Cir. 2016) (citing *Glover*, 736 F.3d at 515). It thus recognized that some situations may exist in which a statutory violation is apparent on the face of an order but suppression is nonetheless inappropriate.

5. A case like this one, in which the defect in the order had no effect on the interception of the evidence introduced at trial, presents such a situation. The overbroad language in the orders here effectively treating a cellphone as a "mobile interception device" was neither a but-for nor a proximate cause of the government's interception of the evidence used at trial. The issuing court here included in its orders all the information necessary to authorize interception; it simply added additional language reflecting a subtle mistake of statutory interpretation (effectively treating a tapped mobile

phone as a "mobile interception device"). The mistake was relevant in only some applications of the orders (when the cellphone was outside Kansas and the government was listening from outside Kansas). And even in that subset of applications, the mistake affected only how such interception could occur (without using an interception device that was itself mobile), not whether Title III could ever permit interception outside the court's territorial jurisdiction. The government lawfully intercepted communications over 10 of the 11 target phones by listening from a wire room in Kansas, J.A. 46-47, and it avoided the potential difficulty with interceptions over the one remaining phone by not using any of that evidence at trial.

It is one thing to suppress evidence and potentially let the criminal "go free because the constable has blundered." *People* v. *Defore*, 150 N.E. 585, 588-589 (N.Y.) (Cardozo, J.), cert. denied, 270 U.S. 657 (1926). But it would be quite another to suppress evidence and potentially let petitioners go free here. Suppression in these circumstances would serve no purpose, and neither general principles of law nor Title III require it.[7]

---

[7] If the Court declines to affirm the court of appeals' judgment, it should remand for further proceedings in which that court can address arguments that it did not previously need to reach. First, Section 2518(10)(a), by its terms, applies only to the interception of "wire or oral" communications, and some of the communications at issue (such as text messages, two of which were admitted at trial, see Gov't Exs. 656, 756) are instead electronic communications. See 18 U.S.C. 2510(12). Second, as the government explained below, any error here was harmless because each petitioner's guilt was established by overwhelming non-Title III evidence—including the testimony of cooperating witnesses, business records, and physical law-enforcement surveillance. See Fed. R. Crim. P. 52(a); 15-3236 Gov't C.A. Br. 32-33; 15-3237 Gov't C.A. Br. 33-34.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOHN P. CRONAN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ERIC J. FEIGIN
ZACHARY D. TRIPP
Assistants to the Solicitor General
FINNUALA K. TESSIER
Attorney

JANUARY 2018

APPENDIX

1. 18 U.S.C. 2510 provides:

Definitions

As used in this chapter—

(1) "wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.[1]

---

[1] So in original. The period probably should be a semicolon.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or (ii) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire, oral, or electronic communications;

(10) "communication common carrier" has the meaning given that term in section 3 of the Communications Act of 1934;

(11) "aggrieved person" means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed;

(12) "electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include—

(A) any wire or oral communication;

(B) any communication made through a tone-only paging device;

(C) any communication from a tracking device (as defined in section 3117 of this title); or

(D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds;

(13) "user" means any person or entity who—

(A) uses an electronic communication service; and

(B) is duly authorized by the provider of such service to engage in such use;

(14) "electronic communications system" means any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications;

(15) "electronic communication service" means any service which provides to users thereof the ability to send or receive wire or electronic communications;

(16) "readily accessible to the general public" means, with respect to a radio communication, that such communication is not—

(A) scrambled or encrypted;

(B) transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of such communication;

(C) carried on a subcarrier or other signal subsidiary to a radio transmission;

(D) transmitted over a communication system provided by a common carrier, unless the communication is a tone only paging system communication; or

(E) transmitted on frequencies allocated under part 25, subpart D, E, or F of part 74, or part 94 of the Rules of the Federal Communications Commission, unless, in the case of a communication transmitted on a frequency allocated under part 74 that is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio;

(17) "electronic storage" means—

(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and

(B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication;

(18) "aural transfer" means a transfer containing the human voice at any point between and including the point of origin and the point of reception;

(19) "foreign intelligence information", for purposes of section 2517(6) of this title, means—

(A) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against—

(i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(iii) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(B) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to—

(i) the national defense or the security of the United States; or

(ii) the conduct of the foreign affairs of the United States;

(20) "protected computer" has the meaning set forth in section 1030; and

(21) "computer trespasser"—

(A) means a person who accesses a protected computer without authorization and thus has no reasonable expectation of privacy in any communication transmitted to, through, or from the protected computer; and

(B) does not include a person known by the owner or operator of the protected computer to have an existing contractual relationship with the owner or operator of the protected computer for access to all or part of the protected computer.

2. 18 U.S.C. 2515 provides:

Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

3. 18 U.S.C. 2516 (2012 & Supp. IV 2016) provides:

Authorization for interception of wire, oral, or electronic communications

(1) The Attorney General, Deputy Attorney General, Associate Attorney General,[1] or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division or National Security Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as

---

[1] See 1984 Amendment note below.

to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2122 and 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), section 2284 of title 42 of the United States Code (relating to sabotage of nuclear facilities or fuel), or under the following chapters of this title: chapter 10 (relating to biological weapons), chapter 37 (relating to espionage), chapter 55 (relating to kidnapping), chapter 90 (relating to protection of trade secrets), chapter 105 (relating to sabotage), chapter 115 (relating to treason), chapter 102 (relating to riots), chapter 65 (relating to malicious mischief), chapter 111 (relating to destruction of vessels), or chapter 81 (relating to piracy);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 37 (relating to violence at international airports), section 43 (relating to animal enterprise terrorism), section 81 (arson within special maritime and territorial jurisdiction), section 201 (bribery of public officials and witnesses), section 215 (relating to bribery of bank officials), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1032 (relating to concealment of

assets), section 1084 (transmission of wagering information), section 751 (relating to escape), section 832 (relating to nuclear and weapons of mass destruction threats), section 842 (relating to explosive materials), section 930 (relating to possession of weapons in Federal facilities), section 1014 (relating to loans and credit applications generally; renewals and discounts), section 1114 (relating to officers and employees of the United States), section 1116 (relating to protection of foreign officials), sections 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1581 (peonage), section 1584 (involuntary servitude), section 1589 (forced labor), section 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or forced labor), section 1591 (sex trafficking of children by force, fraud, or coercion), section 1592 (unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor), section 1751 (Presidential and Presidential staff assassination, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1958 (relating to use of interstate commerce facilities in the commission of murder for hire), section 1959 (relating to violent crimes in aid of racketeering activity), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 1956 (laundering of monetary instruments), section 1957 (relating to engaging in

monetary transactions in property derived from specified unlawful activity), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), section 1343 (fraud by wire, radio, or television), section 1344 (relating to bank fraud), section 1992 (relating to terrorist attacks against mass transportation), sections 2251 and 2252 (sexual exploitation of children), section 2251A (selling or buying of children), section 2252A (relating to material constituting or containing child pornography), section 1466A (relating to child obscenity), section 2260 (production of sexually explicit depictions of a minor for importation into the United States), sections 2421, 2422, 2423, and 2425 (relating to transportation for illegal sexual activity and related crimes), sections 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), section 2340A (relating to torture), section 1203 (relating to hostage taking), section 1029 (relating to fraud and related activity in connection with access devices), section 3146 (relating to penalty for failure to appear), section 3521(b)(3) (relating to witness relocation and assistance), section 32 (relating to destruction of aircraft or aircraft facilities), section 38 (relating to aircraft parts fraud), section 1963 (violations with respect to racketeer influenced and corrupt organizations), section 115 (relating to threatening or retaliating against a Federal official), section 1341 (relating to mail fraud), a felony violation of section 1030 (relating to computer fraud and abuse), section 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapping, and assault), section 831 (relating

to prohibited transactions involving nuclear materials), section 33 (relating to destruction of motor vehicles or motor vehicle facilities), section 175 (relating to biological weapons), section 175c (relating to variola virus), section 956 (conspiracy to harm persons or property overseas), a felony violation of section 1028 (relating to production of false identification documentation), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), section 1541 (relating to passport issuance without authority), section 1542 (relating to false statements in passport applications), section 1543 (relating to forgery or false use of passports), section 1544 (relating to misuse of passports), section 1546 (relating to fraud and misuse of visas, permits, and other documents), or section 555 (relating to construction or use of international border tunnels);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title;

(g) a violation of section 5322 of title 31, United States Code (dealing with the reporting of currency

transactions), or section 5324 of title 31, United States Code (relating to structuring transactions to evade reporting requirement prohibited);

(h) any felony violation of sections 2511 and 2512 (relating to interception and disclosure of certain communications and to certain intercepting devices) of this title;

(i) any felony violation of chapter 71 (relating to obscenity) of this title;

(j) any violation of section 60123(b) (relating to destruction of a natural gas pipeline), section 46502 (relating to aircraft piracy), the second sentence of section 46504 (relating to assault on a flight crew with dangerous weapon), or section 46505(b)(3) or (c) (relating to explosive or incendiary devices, or endangerment of human life, by means of weapons on aircraft) of title 49;

(k) any criminal violation of section 2778 of title 22 (relating to the Arms Export Control Act);

(*l*) the location of any fugitive from justice from an offense described in this section;

(m) a violation of section 274, 277, or 278 of the Immigration and Nationality Act (8 U.S.C. 1324, 1327, or 1328) (relating to the smuggling of aliens);

(n) any felony violation of sections 922 and 924 of title 18, United States Code (relating to firearms);

(*o*) any violation of section 5861 of the Internal Revenue Code of 1986 (relating to firearms);

(p) a felony violation of section 1028 (relating to production of false identification documents), section

1542 (relating to false statements in passport applications), section 1546 (relating to fraud and misuse of visas, permits, and other documents), section 1028A (relating to aggravated identity theft) of this title or a violation of section 274, 277, or 278 of the Immigration and Nationality Act (relating to the smuggling of aliens); or[2]

(q) any criminal violation of section 229 (relating to chemical weapons) or section 2332, 2332a, 2332b, 2332d, 2332f, 2332g, 2332h [3] 2339, 2339A, 2339B, 2339C, or 2339D of this title (relating to terrorism);

(r) any criminal violation of section 1 (relating to illegal restraints of trade or commerce), 2 (relating to illegal monopolizing of trade or commerce), or 3 (relating to illegal restraints of trade or commerce in territories or the District of Columbia) of the Sherman Act (15 U.S.C. 1, 2, 3);

(s) any violation of section 670 (relating to theft of medical products); or

(t) any conspiracy to commit any offense described in any subparagraph of this paragraph.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral, or electronic communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this

---

[2] So in original. The word "or" probably should not appear.

[3] So in original. Probably should be followed by a comma.

chapter and with the applicable State statute an order authorizing, or approving the interception of wire, oral, or electronic communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping[3] human trafficking, child sexual exploitation, child pornography production,,[4] gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

(3) Any attorney for the Government (as such term is defined for the purposes of the Federal Rules of Criminal Procedure) may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant, in conformity with section 2518 of this title, an order authorizing or approving the interception of electronic communications by an investigative or law enforcement officer having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of any Federal felony.

---

[3] So in original. Probably should be followed by a comma.

[4] So in original.

4. 18 U.S.C. 2518 provides:

Procedure for interception of wire, oral, or electronic communications

(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) except as provided in subsection (11), a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the

nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, oral, or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction), if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to

commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) except as provided in subsection (11), there is probable cause for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire, oral, or electronic communication under this chapter shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire, oral, or electronic communication under this chapter shall, upon request of the applicant, direct that a provider of wire or electronic communication service, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such service provider, landlord, custodian, or person is according the person whose communications are to be intercepted. Any provider of wire or electronic communication service, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant for reasonable expenses incurred in providing such facilities or assistance. Pursuant to section 2522 of this chapter, an order may also be issued to enforce the assistance capability and capacity requirements under the Communications Assistance for Law Enforcement Act.

(5) No order entered under this section may authorize or approve the interception of any wire, oral, or electronic communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Such thirty-day period begins on the earlier of the day on which the investigative or law enforcement officer first begins to conduct an interception under the order or ten days after the order is entered. Extensions of an order may be

granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days. In the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception. An interception under this chapter may be conducted in whole or in part by Government personnel, or by an individual operating under a contract with the Government, acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists that involves—

(i) immediate danger of death or serious physical injury to any person,

(ii) conspiratorial activities threatening the national security interest, or

(iii) conspiratorial activities characteristic of organized crime,

that requires a wire, oral, or electronic communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire, oral, or electronic communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order

having been issued, the contents of any wire, oral, or electronic communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on

order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire, oral, or electronic communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any wire, oral, or electronic communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence

derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

(c) The remedies and sanctions described in this chapter with respect to the interception of electronic communications are the only judicial remedies and sanctions for nonconstitutional violations of this chapter involving such communications.

(11) The requirements of subsections (1)(b)(ii) and (3)(d) of this section relating to the specification of the facilities from which, or the place where, the communication is to be intercepted do not apply if—

(a) in the case of an application with respect to the interception of an oral communication—

(i) the application is by a Federal investigative or law enforcement officer and is approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant

Attorney General, or an acting Assistant Attorney General;

(ii) the application contains a full and complete statement as to why such specification is not practical and identifies the person committing the offense and whose communications are to be intercepted; and

(iii) the judge finds that such specification is not practical; and

(b) in the case of an application with respect to a wire or electronic communication—

(i) the application is by a Federal investigative or law enforcement officer and is approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General, or an acting Assistant Attorney General;

(ii) the application identifies the person believed to be committing the offense and whose communications are to be intercepted and the applicant makes a showing that there is probable cause to believe that the person's actions could have the effect of thwarting interception from a specified facility;

(iii) the judge finds that such showing has been adequately made; and

(iv) the order authorizing or approving the interception is limited to interception only for such time as it is reasonable to presume that the person identified in the application is or was reasonably

proximate to the instrument through which such communication will be or was transmitted.

(12) An interception of a communication under an order with respect to which the requirements of subsections (1)(b)(ii) and (3)(d) of this section do not apply by reason of subsection (11)(a) shall not begin until the place where the communication is to be intercepted is ascertained by the person implementing the interception order. A provider of wire or electronic communications service that has received an order as provided for in subsection (11)(b) may move the court to modify or quash the order on the ground that its assistance with respect to the interception cannot be performed in a timely or reasonable fashion. The court, upon notice to the government, shall decide such a motion expeditiously.

No. 17-43

In the Supreme Court of the United States

LOS ROVELL DAHDA AND ROOSEVELT RICO DAHDA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

RICK E. BAILEY
CONLEE, SCHMIDT
& EMERSON, LLP
200 West Douglas Avenue,
Suite 300
Wichita, KS 67202

EDWARD K. FEHLIG, JR.
FEHLIG & FEHLIG-TATUM,
LLC
3002 South Jefferson
Avenue, Suite 207
St. Louis, MO 63118

KANNON K. SHANMUGAM
Counsel of Record
AMY MASON SAHARIA
ALLISON JONES RUSHING
CHARLES L. MCCLOUD
J. LIAT ROME
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

TABLE OF CONTENTS

Page

A. The wiretap orders at issue were facially insufficient 3

B. Title III requires the suppression of evidence obtained pursuant to a facially insufficient wiretap order 7

1. The government's 'fundamental defect' test is deeply flawed 7

2. Even if Title III imposed a 'fundamental defect' test, suppression would still be required because the orders at issue were fundamentally defective 14

3. Section 2518(10)(a)(ii) does not contain an implicit 'severance' principle 18

TABLE OF AUTHORITIES

Cases:

Adams v. *Lankford*, 788 F.2d 1493 (11th Cir. 1986) 13

Berger v. *New York*, 388 U.S. 41 (1967) 9

Chaidez v. *United States*, 568 U.S. 342 (2013) 4

Hughes Aircraft Co. v. *Jacobson*, 525 U.S. 432 (1999) 19

Katz v. *United States*, 389 U.S. 347 (1967) 9

Lamie v. *United States Trustee*, 540 U.S. 526 (2004) 8

Lebron v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995) 4

Olmstead v. *United States*, 277 U.S. 438 (1928) 21

Riley v. *California*, 134 S. Ct. 2473 (2014) 3, 14

Russello v. *United States*, 464 U.S. 16 (1983) 18

Sykes v. *United States*, 564 U.S. 1 (2011) 14

United States v. *Callum*, 410 F.3d 571 (9th Cir.), cert. denied, 546 U.S. 929 (2005) 11

United States v. *Chavez*, 416 U.S. 562 (1974) ..... *passim*

United States v. *Fudge*, 325 F.3d 910 (7th Cir. 2003) 11

Page

Cases—continued:

United States v. *Giordano*, 416 U.S. 505 (1974) .....*passim*
United States v. *Glover*,
736 F.3d 509 (D.C. Cir. 2013) 1, 8, 10, 21
United States v. *Gray*, 521 F.3d 514 (6th Cir. 2008),
cert. denied, 557 U.S. 919 (2009).....11
United States v. *Lomeli*,
676 F.3d 734 (8th Cir. 2012).....11, 17
United States v. *Moore*, 41 F.3d 370 (8th Cir. 1994),
cert. denied, 514 U.S. 1121 (1995).....5
United States v. *North*, 735 F.3d 212 (5th Cir. 2013).....15
United States v. *Ojeda Rios*, 495 U.S. 257 (1990).....17, 18
United States v. *Radcliff*, 331 F.3d 1153 (10th Cir.),
cert. denied, 540 U.S. 973 (2003).....11
United States v. *Traitz*, 871 F.2d 368 (3d Cir.),
cert. denied, 493 U.S. 821 (1989).....5
United States v. *Vest*, 813 F.2d 477 (1st Cir. 1987) 21
Utah v. *Strieff*, 136 S. Ct. 2056 (2016) 21

Constitution, statutes, and rule:

U.S. Const. Amend. IV 2, 9, 20, 21
Omnibus Crime Control and Safe Streets Act of
1968, Pub. L. No. 90-351, tit. 3, 82 Stat. 197, 212
(codified at 18 U.S.C. 2510-2520) .....*passim*
18 U.S.C. 2515 8
18 U.S.C. 2518(3).....3, 6, 13, 16
18 U.S.C. 2518(5).....5, 12
18 U.S.C. 2518(8).....6, 17, 18
18 U.S.C. 2518(10)(a).....8, 18, 20, 21
18 U.S.C. 2518(10)(a)(ii) .....*passim*
S. Ct. R. 14.1(a).....19

Miscellaneous:

Dan Margolies & Mike McGraw, *Federal
Prosecutors in Kansas City, Kansas, Under Fire
for Power Plays in Pursuit of 'Justice,'* KCUR,
Nov. 5, 2017 <tinyurl.com/kansasusao> 17
S. Rep. No. 1097, 90th Cong., 2d Sess. (1968) 9, 10, 14, 15

In the Supreme Court of the United States

No. 17-43

LOS ROVELL DAHDA AND ROOSEVELT RICO DAHDA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

A simple syllogism disposes of this case. Title III requires a court to suppress evidence obtained from a wiretap order, even if the communications at issue were lawfully intercepted, if the order was "insufficient on its face." The wiretap orders obtained by the government in this case were facially insufficient because they concededly violated the requirement that the issuing judge authorize the interception of communications only within the court's territorial jurisdiction. Under the plain terms of the statute, suppression was therefore "automatic"; "[t]here is no room for judicial discretion." *United States* v. *Glover*, 736 F.3d 509, 513, 516 (D.C. Cir. 2013).

In its brief, the government has remarkably little to say about the actual text of Title III, which mandates suppression without exception. And it has little more to say in response to the legislative history cited by petitioners and their amici, which confirms Congress's desire to "prohibit * * * all interceptions of oral and wire communications, except those specifically provided for in the Act." *United States* v. *Giordano*, 416 U.S. 505, 514 (1974).

Instead, the government engages in a scattershot effort to make this case about anything other than the question presented and the language and history of Title III. For starters, the government asserts that the wiretap orders here were not facially insufficient but instead merely overbroad. But no court has accepted that implausibly narrow definition of "insufficient"; indeed, the government did not raise that argument below and, as far as we are aware, has never advanced it in any other case. That is for good reason: an order that on its face concededly violates Title III cannot possibly be "sufficient." In the remainder of its brief, the government presses other arguments that were not raised below, draws analogies to inapplicable Fourth Amendment doctrines, and incorrectly attempts to recast its own overreach as a court's good-faith mistake.

When the government actually joins issue on the question presented, its arguments are painfully thin. The government seeks to engraft an atextual and amorphous "fundamental defect" requirement on Title III's exception-free suppression remedy. Even under that requirement, petitioners would still prevail, because the territorial-jurisdiction limitation that was concededly violated here is not merely a "technical" requirement. Instead, it furthers Title III's overarching goal of protecting privacy by ensuring that judges exercise their responsibility

closely to supervise electronic surveillance conducted in their respective jurisdictions.

The government protests the "harsh medicine" of suppression. Br. 37. But that medicine was prescribed by Congress. Strict compliance with the requirements of Title III is a statutory command, not merely "an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Riley* v. *California*, 134 S. Ct. 2473, 2493 (2014) (citation omitted).

Make no mistake about what is really going on here: the government, not content with the delicate balance struck by Title III, is asking this Court to rewrite the statute by effectively nullifying either the territorial-jurisdiction limitation in Section 2518(3) or the facial-insufficiency ground for suppression in Section 2518(10)(a)(ii). But that is obviously a task not for the Court, but for Congress. The plain text of Title III mandates suppression where, as here, the underlying wiretap orders were facially insufficient because they exceeded the issuing court's jurisdiction. The judgments of the court of appeals should therefore be reversed.

A. The Wiretap Orders At Issue Were Facially Insufficient

Each of the wiretap orders at issue here was "insufficient on its face," 18 U.S.C. 2518(10)(a)(ii), because each order purported to authorize the interception of communications that the issuing judge lacked the power to authorize. The government now concedes that the orders authorized interceptions that would not comply with Title III. See Br. 7. But it contends that the issuing judge's error rendered the orders "overbroad" rather than facially insufficient. See Br. 16. In the government's view, because the error could supposedly have been rectified by

omitting the language impermissibly authorizing extra-territorial interception, the orders were not "lacking" or "missing" anything and thus were not insufficient. See Br. 16-19.

1. As an initial matter, the government did not raise that argument in the district court or in the court of appeals; it argued only that the orders did not violate Title III at all (an argument it has now abandoned). See, *e.g.*, 15-3236 Gov't C.A. Br. 24-33; 15-3237 Gov't C.A. Br. 24-34. This Court does not ordinarily consider an argument that was neither pressed nor passed upon below. See, *e.g.*, *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995). Indeed, petitioners have been unable to locate any other case in which the government has advanced its "overbreadth" argument; the government appears to have devised it only after this case reached the Solicitor General's Office. The Court granted review on the premise that the orders at issue were facially insufficient, see Pet. i (question presented), and it should decline to address the government's argument on the familiar ground that it is a "court of review, not of first view." *Chaidez* v. *United States*, 568 U.S. 342, 358 n.16 (2013) (citation omitted).

2. In any event, the government's newfangled argument lacks merit. The phrase "insufficient on its face" implies a comparison between the four corners of the order itself and the requirements of Title III; if the failure to comply with those requirements is evident from the text of the order, it is facially insufficient. See, *e.g.*, *Giordano*, 416 U.S. at 525 n.14; *United States* v. *Chavez*, 416 U.S. 562, 573-574 (1974); *United States* v. *Scurry*, 821 F.3d 1, 8 (D.C. Cir. 2016). The government does not dispute, and in fact concedes, that the orders did not comply with the territorial-jurisdiction requirement of Title III. See Br. 7.

For that reason, the orders at issue here were "defect[ive]" or "deficient," U.S. Br. 19, and therefore "insufficient on [their] face." Consistent with the foregoing understanding, lower courts have routinely asked whether an order was "invalid" or "defective" when faced with a challenge to the order's facial sufficiency. See, *e.g.*, *United States* v. *Traitz*, 871 F.2d 368, 378-379 (3d Cir.), cert. denied, 493 U.S. 821 (1989); *United States* v. *Moore*, 41 F.3d 370, 375-376 (8th Cir. 1994), cert. denied, 514 U.S. 1121 (1995); see also 15-3236 Gov't C.A. Br. 24, 30 (referring to whether the orders were facially "invalid").

The government suggests that an order is facially insufficient only if it is "lacking" or "missing" a provision that it is affirmatively required to contain, and not if it includes an invalid provision that contradicts a requirement of Title III. See Br. 17. But that cannot possibly be correct, because it would lead to bizarre results. On the government's view, an order that affirmatively authorized interception for 180 days rather than 30 (in violation of Section 2518(5)) would not be facially insufficient (because it would merely be "overbroad"), but an order that omitted a durational provision altogether would be insufficient. See Br. 24. That makes no sense; both orders are equally invalid, and thus insufficient, on their face.

3. The government further contends that the orders at issue here are not insufficient because Title III does not require wiretap orders to contain a jurisdictional provision; according to the government, the only provisions a wiretap order must contain are set out in a single subsection of Title III, Section 2518(4). See Br. 17. But while Section 2518(4) certainly identifies *some* information that a wiretap order must contain, nothing in that subsection suggests that it provides an exhaustive list. Cf. 18 U.S.C. 2518(5) (setting out additional provisions that must be included).

The plain language of Section 2518(3) makes clear that a wiretap order must contain a jurisdictional limitation. Section 2518(3) is the provision of Title III that empowers a judge to enter a wiretap order in the first place; it permits an order "authorizing * * * interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting" (except where the judge further "authorize[s]" the use of a mobile interception device). 18 U.S.C. 2518(3). The territorial-jurisdiction limitation does not appear in the separate provisions governing how an interception is to be conducted, see, *e.g.*, 18 U.S.C. 2518(8); instead, it is a defining feature of the order a judge is permitted to enter. Unsurprisingly, the government cites no case from any court that stands for the proposition that a wiretap order can be silent on the fundamental question of where interception may occur.

In any event, this case does not present, and the Court need not reach, the question whether a (presumably rare) order that omits any jurisdictional provision can be justified on the theory that the statutory jurisdictional limitation is somehow "inherent" and "incorporate[d] by default" in such an order. See U.S. Br. 17, 18. Here, the orders at issue did not merely omit a jurisdictional provision; they went further and contained a provision that affirmatively and concededly *violated* the jurisdictional limitation in Section 2518(3). See U.S. Br. 7. Under those circumstances, the orders were facially defective and thus "insufficient." The question presented, to which we now turn, is whether that type of facial insufficiency requires suppression.

B. Title III Requires The Suppression Of Evidence Obtained Pursuant To A Facially Insufficient Wiretap Order

Section 2518(10)(a)(ii) requires a court to suppress evidence derived from a wiretap order that "is insufficient on its face." As petitioners have explained, the plain text of the statute requires the suppression of evidence obtained from a facially insufficient wiretap order. See Pet. Br. 17-25. Not content with the statute Congress actually wrote, the government invites the Court to engraft an atextual and amorphous "fundamental defect" requirement onto the statute's suppression remedy. See Br. 19-31. The Court should decline that invitation.

1. The Government's 'Fundamental Defect' Test Is Deeply Flawed

a. The government does not dispute that Congress's purpose in enacting Title III was to "prohibit, on the pain of criminal and civil penalties, all interceptions of oral and wire communications, except those specifically provided for in [the statute]." *Giordano*, 416 U.S. at 514 (footnote omitted). In the government's view, however, only a "fundamental defect"—that is, a "defect that renders an order so deficient on its face that the government cannot rely on it"—can trigger Title III's suppression remedy for facially insufficient wiretap orders. Br. 19.

That "fundamental defect" requirement appears to be a mutant version of the "core concerns" requirement that the court of appeals applied in the decisions below. Yet it suffers from the same fatal flaw: it finds no support in Title III's text or history. In fact, both the text and history confirm Congress's desire to ensure strict compliance with the limitations on the availability of wiretaps and its corresponding desire to require suppression when-

ever those limitations are transgressed by a facially insufficient wiretap order, even if the communications at issue were lawfully intercepted.

As to the text: Title III's command to suppress evidence derived from a facially insufficient wiretap order admits of no exceptions or qualifications. Title III states that, "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial * * * if the disclosure of that information would be in violation of this chapter." 18 U.S.C. 2515. And if "the order of authorization or approval under which [the communication] was intercepted is insufficient on its face," 18 U.S.C. 2518(10)(a)(ii), the contents of the communication "shall be treated as having been obtained in violation of this chapter," 18 U.S.C. 2518(10)(a). Title III thus imposes a "mechanical test" that leaves "no room for judicial discretion." *Glover*, 736 F.3d at 513. Under that test, when a facially insufficient wiretap order has been issued, "[s]uppression is the mandatory remedy." *Ibid.*

Where, as here, the statutory text is unambiguous, the inquiry is complete unless the resulting interpretation would be absurd. See, *e.g.*, *Lamie* v. *United States Trustee*, 540 U.S. 526, 534 (2004). But the government does not contend that petitioners' interpretation gives rise to absurdity: at most, the government accuses petitioners of "provid[ing] no practical reason why Congress would have intended an error of the sort at issue here to require suppression." Br. 30. That accusation is unfounded: as petitioners have explained, in light of the widespread concern for privacy, Congress could readily have intended (and in fact did intend) to create incentives for strict compliance with Title III's requirements, including the territorial-jurisdiction limitation. See Pet. Br. 34-36. To the extent the

government takes issue with that policy choice, that is a matter to be addressed not to this Court, but to Congress.

As to the history: the question before Congress when it enacted Title III was not simply what might constitute an acceptable degree of electronic surveillance, but whether electronic surveillance should *ever* be permitted. See Pet. Br. 34-35; Rutherford Inst. Br. 18-20. In the wake of this Court's decisions in *Berger* v. *New York*, 388 U.S. 41 (1967), and *Katz* v. *United States*, 389 U.S. 347 (1967), there was substantial disagreement as to whether law enforcement could lawfully engage in electronic surveillance consistent with the Fourth Amendment. In enacting Title III, Congress recognized that wiretapping is inimical to a free society as an "encroachment[] on a man's right to privacy." S. Rep. No. 1097, 90th Cong., 2d Sess. 170 (1968). Accordingly, Congress prohibited wiretaps subject to certain specific and narrow exceptions, and it provided a muscular suppression remedy for violations of Title III's detailed requirements.

The government contends that "Congress could not have intended to [require suppression for] every possible * * * defect that an order might exhibit." Br. 13. Yet that is pure *ipse dixit*. The government barely acknowledges the legislative history; to the extent it does, it primarily relies on a statement in the Senate report that Congress had no intent to "press the scope of the suppression role beyond present search and seizure law." Br. 33 (quoting S. Rep. No. 1097, *supra*, at 96). But as this Court explained in *Giordano* in rejecting the government's reliance on the very same statement, "it would not extend existing search-and-seizure law for Congress to provide for the suppression of evidence obtained in violation of explicit statutory prohibitions." 416 U.S. at 528-529 (citations omitted). And in the same report, the Senate Judiciary Committee emphasized that Title III's suppression

provision "should serve to guarantee that the standards of [Title III] will sharply curtail the unlawful interception of wire and oral communications." S. Rep. No. 1097, *supra*, at 96.

b. In proposing its "fundamental defect" requirement, the government (like the court of appeals) draws on this Court's decisions in *Chavez* and *Giordano*, which adopted what courts have called the "core concerns" test for determining whether suppression is required under subparagraph (i) for "unlawfully intercepted" communications. The government attempts to argue forward from the holdings of those cases; if unlawful interception under subparagraph (i) does not result in suppression unless the violation was "sufficiently important," the argument goes, it must follow that Congress could not have intended to allow facial insufficiency under subparagraph (ii) to result in automatic suppression "even of evidence that was lawfully intercepted within the issuing court's territorial jurisdiction." Br. 21-22.

That argument simply ignores the fact that the Court limited the suppression remedy in subparagraph (i) precisely in order to *distinguish* it from subparagraphs (ii) and (iii), thus giving each subparagraph independent content. See Pet. Br. 26-28. In both cases, the Court concluded that subparagraphs (ii) and (iii) "must be deemed to provide suppression for failure to observe some statutory requirements that would not render interceptions unlawful under [sub]paragraph (i)." *Giordano*, 416 U.S. at 527; see *Chavez*, 416 U.S. at 575. As a result, applying a narrowing construction to subparagraph (ii) as well as to subparagraph (i) "would turn [this] Court's approach on its head, elevating policy over text." *Glover*, 736 F.3d at 513.

In an effort to convince the Court that extending the subparagraph (i) test into subparagraph (ii) would not

render subparagraph (ii) superfluous, the government offers two hypotheticals. But neither of those hypotheticals is reassuring.

The government first argues that, under its "fundamental defect" test, subparagraph (ii) would require suppression if "the order and any accompanying materials entirely failed to identify the individual who approved the application," even if an appropriate official did in fact approve the application. Br. 23. That is a remarkable argument for the government to make, because numerous lower courts have considered that question and concluded—*at the government's urging*—that subparagraph (ii) did not require suppression for that type of facial insufficiency under the "core concerns" test of *Chavez* and *Giordano*. See, *e.g.*, *United States* v. *Gray*, 521 F.3d 514, 526-527 (6th Cir. 2008), cert. denied, 557 U.S. 419 (2009); *United States* v. *Fudge*, 325 F.3d 910, 917-918 (7th Cir. 2003); *United States* v. *Callum*, 410 F.3d 571, 576 (9th Cir.), cert. denied, 546 U.S. 929 (2005); *United States* v. *Radcliff*, 331 F.3d 1153, 1163 (10th Cir.), cert. denied, 540 U.S. 973 (2003).

The government does not cite any of those decisions; instead, it relies on the Eighth Circuit's outlying decision in *United States* v. *Lomeli*, 676 F.3d 734 (2012), which held that subparagraph (ii) did require suppression for the failure to identify the official who approved the application. See Br. 24. But *Lomeli* actually illustrates the fundamental problem that results from importing the "core concerns" test (or some variation thereof) from subparagraph (i) into subparagraph (ii). See *Lomeli*, 676 F.3d at 739 & n.4 (noting that the district court had treated subparagraphs (i) and (ii) as identical and held that suppression was required under both).

The government next argues that, under its "fundamental defect" test, subparagraph (ii) would require suppression where a judge initially prepared a wiretap order limiting the duration of interception but a law clerk then accidentally deleted the limitation. See Br. 24. Later in its brief, however, the government contends that, under its "severance" principle, subparagraph (ii) would not require suppression of any evidence from communications that were lawfully intercepted within the 30-day time limit set out in 18 U.S.C. 2518(5), even if the wiretap order was facially insufficient. See Br. 37. And even if suppression would be required, it is hard to imagine that this far-fetched hypothetical would occur with any frequency in the real world.

In all events, the government cannot seriously dispute that its proposed "fundamental defect" requirement would leave subparagraph (ii) with either no work to do or very little, in contravention of the Court's reasoning in *Chavez* and *Giordano*. And more fundamentally, that requirement has no footing in the text of subparagraph (ii).

c. As if more reason were needed, the Court should reject the government's proposed "fundamental defect" requirement because it is impossibly vague.

Beyond the two hypotheticals discussed above, the government never explains what constitutes a "fundamental defect" under its proposed test. Is a defect automatically "fundamental" where it relates to a requirement set out in Section 2518(4)? If not, how should courts determine which of Title III's requirements are sufficiently important to qualify? Is an egregious violation of a less important requirement equivalent to a less egregious violation of a more important requirement? And how is the severity of a violation to be determined, beyond merely looking at the nature of the requirement being violated?

The government offers no answers to these and many other questions.

In addition, it is unclear whether the government's "fundamental defect" test is even the same as the so-called "core concerns" test that this Court adopted in *Chavez* and *Giordano* for determining whether suppression was required under subparagraph (i). If anything, the government's test appears to set a higher bar for suppression. The "core concerns" test looks to whether the violated statutory requirement "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures," and it is satisfied where the violated provision "was intended to play a central role in the statutory scheme." *Giordano*, 416 U.S. at 527, 528; *Chavez*, 416 U.S. at 575.

The government's "fundamental defect" test, by contrast, would consider both the "nature and *severity* of the statutory violation in relation to the purpose of Title III's suppression remedy," Br. 22 (emphasis added), thus suggesting that less "sever[e]" violations even of Title III's most important provisions could be excused. While the government draws (albeit selectively) on this Court's decisions in *Chavez* and *Giordano*, it does not answer the obvious question of whether its test is the same as the *Chavez* and *Giordano* test—and, if not, how it differs.[1]

---

[1] Neither *Chavez* nor *Giordano* uses the phrase "fundamental defect" in articulating the standard for suppression under subparagraph (i). The government appears to have borrowed that phrase from the Eleventh Circuit's decision in *Adams* v. *Lankford*, 788 F.2d 1493 (1986), which held that, because alleged violations of Section 2518(3)'s territorial-jurisdiction limitation "d[id] not implicate Congress' core concerns in passing Title III," the violations *a fortiori* were not "fundamental defects resulting in a complete miscarriage of justice" and thereby not cognizable on a petition for habeas corpus. *Id.* at 1500.

In short, what the government asks this Court to do bears no resemblance to statutory interpretation and close resemblance to statutory drafting. But the latter is a task for Congress. And even Congress would be ill-advised to adopt such an amorphous test—one that would "keep defendants and judges guessing for years to come." *Riley*, 134 S. Ct. at 2493 (quoting *Sykes* v. *United States*, 564 U.S. 1, 34 (2011) (Scalia, J., dissenting)). That is exactly the opposite of the result Congress sought in adopting a bright-line suppression remedy in Title III, which aimed to "delineat[e] on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." S. Rep. No. 1097, *supra*, at 66.

2. Even If Title III Imposed A 'Fundamental Defect' Test, Suppression Would Still Be Required Because The Orders At Issue Were Fundamentally Defective

For the preceding reasons, there is no valid basis for departing from the statute's plain text and engrafting a "fundamental defect" requirement onto Section 2518(10)(a)(ii). Because the wiretap orders at issue are facially insufficient, the court of appeals should have held that the evidence derived from those orders should have been suppressed.

Even if Section 2518(10)(a)(ii) could somehow be read to contain a "fundamental defect" requirement, however, that requirement would be satisfied here, because the orders at issue were fundamentally defective by any measure. The territorial-jurisdiction limitation "was intended to play a central role in the statutory scheme," *Giordano*, 416 U.S. at 528, and the government's contrary arguments are meritless.

a. The government primarily contends (Br. 26-27, 30) that Title III's territorial-jurisdiction limitation does not

protect individual privacy. That is incorrect. As petitioners and their amici have explained, the requirement that a judge authorize interception only within the court's territorial jurisdiction restricts the ability of prosecutors to engage in forum shopping when applying for wiretap authorizations. See Pet. Br. 35-36; EFF/NACDL Br. 20-21. Limiting forum shopping, in turn, helps to ensure that "the right of privacy of our citizens will be carefully safeguarded by a scrupulous system of impartial court authorized supervision." S. Rep. No. 1097, *supra*, at 225; *United States* v. *North*, 735 F.3d 212, 219 (5th Cir. 2013) (DeMoss, J., concurring).

Echoing the court of appeals, the government contends that it can still engage in forum shopping even under petitioners' interpretation by using a listening post in a preferred judge's district. See Br. 30 (quoting Pet. App. 24a). But even if the government now has the technological capability to locate a listening post wherever it wishes, see U.S. Br. 6 n.2, practical considerations are likely to prevent it from doing so. As amici have explained, Title III is most efficiently executed when the individuals monitoring the surveilled communications are in close proximity to the prosecutors and law-enforcement officials leading the investigation. See EFF/NACDL Br. 19-20. And the government does not dispute that, under its interpretation, there would be no effective restraint on forum shopping, because there would seemingly be no consequence for a violation of the territorial-jurisdiction limitation.

In addition, the government's efforts to downplay the importance of the territorial-jurisdiction limitation are at odds with its insistence that the limitation need not be expressly stated because it is somehow "inherent" and "incorporate[d] by default" in any wiretap order. See Br. 17, 18. If the requirement that a judge authorize interception

only within the court's territorial jurisdiction is so essential that it must be read into every wiretap order, it surely follows that the territorial-jurisdiction limitation is fundamental to Title III's statutory scheme. And an order that not only fails to include that limitation, but concededly violates it, is "fundamentally defective" under any meaningful understanding of the phrase.

b. Perhaps acknowledging the difficulty with the argument that violations of the territorial-jurisdiction limitation do not constitute "fundamental defects," the government contends (Br. 28-30), seemingly in the alternative, that *these* violations do not rise to that level on the ground that the erroneous provision in the orders at issue resulted from an honest mistake. Indeed, the government suffuses its brief with atmospheric references to the issuing court's "mistake[n]" understanding of the exception to the territorial-jurisdiction requirement for "mobile interception devices." See, *e.g.*, Br. 12, 13, 14, 16, 19, 22, 24, 25, 26, 28, 39, 40.

But there does not appear to be any support in the record for the proposition that the issuing court was actually operating on a mistaken understanding—or indeed any understanding—of the territorial-jurisdiction requirement when it issued the orders in question. To the contrary, as the government acknowledges, the issuing court rubber-stamped the "same language" that "appeared in the government's applications for the orders." Br. 7 n.3. And the government's applications do not appear to have flagged any issue concerning the interpretation of the territorial-jurisdiction requirement, but instead merely requested the authority to conduct interception anywhere in the United States if the targeted mobile telephones were transported outside Kansas. See, *e.g.*, 15-3236 C.A. Supp. Rec. vol. 4, at 57, 67. Although Section 2518(3) requires a

judge's specific authorization for the use of a "mobile interception device," neither the government's applications nor the orders themselves say anything about the use of such devices.[2]

Perhaps for that reason, while the government contends that Title III's suppression remedy incorporates an (again atextual) good-faith exception, see Br. 30, it has not argued that any good-faith exception would apply in this case and in fact waives that argument before this Court. See Br. 35 n.6; cf. *Lomeli*, 676 F.3d at 743 (holding that any good-faith exception would be inapplicable where "the applicant failed to comply with the edicts of the federal wiretap statute in procuring the order"). *A fortiori*, the government cannot contend that any mistake by the issuing court—seemingly induced by the government itself—means the resulting violations in this case are not "fundamental."

c. In support of its argument that suppression is unnecessary where an issuing court (or the government) makes a mistake on a question of statutory interpretation, the government relies on this Court's decision in *United States* v. *Ojeda Rios*, 495 U.S. 257, 259 (1990). See Br. 28. But *Ojeda Rios* is plainly distinguishable because it involved a discrete provision of Title III, Section 2518(8)(a), which provides for the sealing of wiretapped communications and contains a specific remedy for the violation of its requirements. Under that provision, suppression is not

---

[2] The Assistant United States Attorney who applied for the wiretap orders has repeatedly been cited for her prosecutorial misconduct in criminal cases; she was recently found to have engaged in witness intimidation in one case, and was accused of suppression of exculpatory evidence and failure to disclose a romantic relationship with the judge in another. See, *e.g.*, Dan Margolies & Mike McGraw, *Federal Prosecutors in Kansas City, Kansas, Under Fire for Power Plays in Pursuit of 'Justice,'* KCUR, Nov. 5, 2017 <tinyurl.com/kansasusao>.

required if the government provides a "satisfactory explanation" for any violation. 18 U.S.C. 2518(8)(a).

To the extent the Court in *Ojeda Rios* analyzed whether the government had acted in an "objectively reasonable" manner, it was simply interpreting the "satisfactory explanation" requirement of Section 2518(8)(a), not recognizing some principle governing suppression under Title III more generally. 495 U.S. at 265-266. Indeed, the Court made clear that the general suppression remedy in Section 2518(10)(a) was "not applicable" in that case. *Id.* at 260 n.1. If anything, Congress's considered decision to create what is effectively an exception from suppression in Section 2518(8)(a), while refraining from doing so in Section 2518(10)(a), underscores its intent that the latter provision be strictly enforced. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Of course, in light of the plain text of Section 2518 (10)(a)(ii), the Court need not consider whether violations of the territorial-jurisdiction limitation more generally, or the particular violations at issue in this case, constitute "fundamental defects" that warrant suppression. Where, as here, a wiretap order violates that limitation, suppression of the evidence derived from the order is required. The Court should reject the government's creative efforts to sustain the court of appeals' contrary conclusion.

3. Section 2518(10)(a)(ii) Does Not Contain An Implicit 'Severance' Principle

As a last-ditch attempt to avoid suppression, the government contends that, even if the wiretap orders are facially insufficient, only the evidence that resulted from an invalid "application" of the insufficient orders should be suppressed. See Br. 31. According to the government, because the evidence introduced at trial in this case was

derived from communications that were "lawfully intercepted," this Court can simply disregard the fact that the evidence was obtained under wiretap orders that were "insufficient on [their] face." Br. 14. That is perhaps the government's most ambitious argument, and it should be rejected for multiple reasons.

a. As a preliminary matter, the government did not raise its "severance" argument in the district court or in the court of appeals, nor did it raise it in its brief in opposition to certiorari. Like the government's "overbreadth" argument, therefore, that argument is not properly before this Court. See p. 4, *supra*. Nor is the "severance" argument fairly included in the question presented in the petition for certiorari, on which the Court granted review. See S. Ct. R. 14.1(a). Tellingly, in its merits brief, the government revises the question presented from its brief in opposition (which itself revised the question from the petition) so as to smuggle in the "severance" argument. Compare U.S. Br. i with U.S. Br. in Opp. i. And as with the government's "overbreadth" argument, petitioners have been unable to locate any other case in which the government has advanced its equally novel "severance" argument.

b. In any event, the government's argument lacks merit. The plain language of Section 2518(10)(a)(ii) requires the suppression of any evidence derived from an "order" that is "insufficient on its face." If an order is facially insufficient, all of the evidence obtained under that order must be suppressed; subparagraph (ii), unlike subparagraph (i), does not contemplate an additional inquiry into whether a particular communication was unlawfully intercepted, or whether a different or narrower order could have been facially sufficient. Because the statutory language provides a clear answer, the analysis should

begin and end there. See, *e.g.*, *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999).

The government's linguistic contortions demonstrate the near-absurdity of its argument. According to the government, even if orders are "insufficient on their face" "in some applications," they may not be "insufficient on their face" "in all of them." Br. 31. But the structure of Section 2518(10)(a) makes clear that whether an order is insufficient on its face has nothing to do with how it is "applied"; an order is either sufficient on its face or it is not, and whether a particular "application" of an order is unlawful is the province of subparagraph (i), not subparagraph (ii).

The government's argument amounts to an attempt to read subparagraph (ii) out of the statute by collapsing it into subparagraph (i). Indeed, the government makes little effort to disguise its intent, contending that "suppression is unwarranted [here] because all of the evidence at trial was lawfully intercepted." Br. 14. That may be one way to balance the competing interests of law enforcement and the public, but it is decidedly not the balance that Congress struck. Title III necessarily contemplates suppression in some circumstances in which a communication was lawfully intercepted.

c. In support of its "severance" argument, the government invokes a variety of Fourth Amendment doctrines that limit the scope of the exclusionary rule. See Br. 33-37. As a preliminary matter, while lower courts have recognized a Fourth Amendment doctrine under which the valid portions of a search warrant may be severed from the invalid portions, see U.S. Br. 34 (citing cases), this Court has never recognized, much less applied, that doctrine.

More broadly, the doctrines cited by the government doctrine are inapplicable in the context of Title III. Those doctrines limit the operation of the Fourth Amendment

exclusionary rule. As the Court is well aware, however, that rule is a judicially created remedy for Fourth Amendment violations, under which the suppression of evidence is "[a] last resort, not [a] first impulse." *Utah* v. *Strieff*, 136 S. Ct. 2056, 2061 (2016) (citation omitted). Given that premise, the Court has appropriately recognized a variety of exceptions to the exclusionary rule, see *ibid.*, and lower courts have recognized still others.

Under Section 2518(10)(a), by contrast, "[t]he issue [of suppression] does not turn on the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights, but upon the provisions of Title III." *Giordano*, 416 U.S. at 524. Unlike the judge-made exclusionary rule, the courts are "limited to interpreting rather than modifying" the provisions of Title III. *United States* v. *Vest*, 813 F.2d 477, 481 (1st Cir. 1987). And under Section 2518(10)(a), suppression is anything but a "last resort"; where the requirements of any of its subparagraphs are satisfied, suppression is an "automatic" and "mechanical" remedy. *Glover*, 736 F.3d at 513, 516.

* * * * *

Writing for the Court in *Olmstead* v. *United States*, 277 U.S. 438 (1928), Chief Justice Taft presciently recognized that, beyond the protections of the Fourth Amendment, "Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation." *Id.* at 465. In enacting Title III, Congress did just that. While Congress gave law enforcement a powerful investigative tool it did not previously possess, it simultaneously required it to comply with an intricate series of rules, the violation of which would lead to the suppression of the resulting evidence.

In particular, Congress provided in unambiguous language that, if a Title III order were facially insufficient, all of the evidence derived from the order should be suppressed, even if the communications at issue were lawfully intercepted. As a common thread in all of its arguments, the government takes issue with Congress's choice to include facial insufficiency as an independent ground for suppression in Title III (and to include an enforceable restriction on an issuing court's jurisdiction). But the government can and should address that concern to Congress in the first instance. It may not ask this Court to usurp the role of Congress and rewrite the statute by engrafting judicially created limitations onto it.

In sum, the government cannot escape two simple propositions. Title III requires a court to suppress all evidence derived from a facially insufficient wiretap order. And the orders at issue here were facially insufficient because they concededly violated Title III's territorial-jurisdiction limitation. Under those circumstances, suppression is required. The judgments of the court of appeals should therefore be reversed.

Respectfully submitted.

RICK E. BAILEY
CONLEE, SCHMIDT
& EMERSON LLP
200 West Douglas Avenue,
Suite 300
Wichita, KS 67202

Counsel for Petitioner
Los Rovell Dahda

EDWARD K. FEHLIG, JR.
FEHLIG & FEHLIG-TATUM,
LLC
3002 South Jefferson
Avenue, Suite 207
St. Louis, MO 63118

Counsel for Petitioner
Roosevelt Rico Dahda

KANNON K. SHANMUGAM
AMY MASON SAHARIA
ALLISON JONES RUSHING
CHARLES L. MCCLOUD
J. LIAT ROME
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

Counsel for Petitioner
Los Rovell Dahda

FEBRUARY 2018

No. 17-43

IN THE

Supreme Court of the United States

LOS ROVELL DAHDA AND
ROOSEVELT RICO DAHDA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICI CURIAE* ELECTRONIC FRONTIER FOUNDATION AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

JEFFREY T. GREEN
Co-Chair Amicus Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1660 L Street, NW
Washington, DC 20036
(202) 872-8600

ILANA H. EISENSTEIN
Counsel of Record
JASON D. GERSTEIN
MARC A. SILVERMAN
DLA PIPER LLP (US)
One Liberty Place
Philadelphia, PA 19109
(215) 656-3300
ilana.eisenstein@dlapiper.com

JENNIFER LYNCH
ANDREW CROCKER
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
(415) 436-9333

Counsel for Amici Curiae

277252

TABLE OF CONTENTS

Page

TABLE OF CONTENTS.....i

TABLE OF CITED AUTHORITIES.....iii

INTEREST OF *AMICI CURIAE*.....1

SUMMARY OF THE ARGUMENT.....1

ARGUMENT.....4

I. Title III, Including Its Territorial Limitation, Was Expressly Designed To Limit Intrusion And Protect Privacy.....4

A. Wiretaps Pose A Serious Threat To Privacy As Congress, States, And This Court Have Long Recognized.....4

B. With Those Privacy Concerns At The Forefront, Congress Enacted Title III To Permit Wiretaps In Only Limited Circumstances.....6

C. The Privacy Concerns Animating Title III Have Become More Acute With Advancing Telecommunications Technology.....11

D. Since Title III's Passage, Wiretapping Has Drastically Expanded.....14

Table of Contents

Page

II. Title III's Territorial Limitation Is An Important Component Of The Statute's Restrictive Framework 17

A. Title III's Territorial Limits Are Critical To The Function Of Its Statutory Scheme 17

B. Title III's Territorial Limitation Protects Privacy By Limiting Forum Shopping.....20

C. Territorial Limitations Have Long Been Central To Our Nation's Laws.....22

D. The Government Is Incorrect That Title III Imposes No Territorial Limits On Cell Phone Wiretaps.....25

III. Congress Imposed The "Automatic Remedy" of Suppression To Enforce the Statute as a Whole 26

CONCLUSION 31

APPENDIX.....1a

TABLE OF CITED AUTHORITIES

Page

CASES

Berger v. *State of N.Y.*,
388 U.S. 41 (1967).....5, 6

Katz v. *United States*,
389 U.S. 347 (1967).....6

Matter of Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.,
829 F.3d 197 (2d Cir. 2016), cert granted sub nom. *United State v. Microsoft Corp.*, No. 17-2, 2017 WL 2869958 (U.S. Oct. 16, 2017).....22

Nardone v. *United States*,
302 U.S. 379 (1937).....5, 8

Olmstead v. *United* States,
277 U.S. 438 (1928).....4, 6

Riley v. *California*,
134 S. Ct. 2473 (2014).....2, 11, 14

Scott v. *United States*,
436 U.S. 128 (1978).....10

United States v. *Amanuel*,
615 F.3d 117 (2d Cir. 2010).....27

Cited Authorities

Page

United States v. *Dahda*,
853 F.3d 1101 (10th Cir. 2017) 28

United States v. *Emmanuel*,
565 F.3d 1324 (11th Cir. 2009) 20

United States v. *Giordano*,
416 U.S. 505 (1974) 9

United States v. *Glover*,
736 F.3d 509 (D.C. Cir. 2013) 28, 29

United States v. *Gordon*,
871 F.3d 35 (1st Cir. 2017) 20, 28

United States v. *Jackson*,
849 F.3d 540 (3d Cir. 2017) 17

United States v. *Krueger*,
809 F.3d 1109 ..... 22, 23, 25

United States v. *Lefkowitz*,
285 U.S. 452 (1932) 23

United States v. *Martin*,
618 F.3d 705 (7th Cir. 2010), as amended
(Sept. 1, 2010) 19

United States v. McLee,
436 F.3d 751 (7th Cir. 2006) 13

Cited Authorities

Page

United States v. *North*,
735 F.3d 212 (5th Cir. 2013) 20, 29

United States v. *Ojeda Rios*,
495 U.S. 257 (1990) 1, 7, 19

United States v. *Patane*,
542 U.S. 630 (2004) 28

United States v. *Reed*,
575 F.3d 900 (9th Cir. 2009) 13

United States v. *Scurry*,
821 F.3d 1 (D.C. Cir. 2016) 7

United States v. *Vazquez*,
605 F.2d 1269 (2d Cir. 1979) 18-19

United States v. *Vest*,
813 F.2d 477 (1st Cir. 1987) 27

Weinberg v. *United States*,
126 F.2d 1004 (2d Cir. 1942) 23

STATUTES

Title III, Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-22 ..... *passim*

18 U.S.C. 2515 26

Cited Authorities

Page

18 U.S.C. 2516(1) 9

18 U.S.C. 2518(1)(c) 9

18 U.S.C. 2518(1)(f) 9, 18

18 U.S.C. 2518(3) 17, 19

18 U.S.C. 2518(5) 9

18 U.S.C. 2518(6) 10, 18

18 U.S.C. 2518(8) 10

18 U.S.C. 2518(8)(a) 9, 18

18 U.S.C. 2518(10) 26

18 U.S.C. 2518(10)(a) 26

18 U.S.C. 2519(1)-(2) 10

18 U.S.C. 2519(3) 10

42 U.S.C. 3711 6

47 U.S.C. 1001-1010 12

Fed. R. Crim. P. 41 ..... 3, 23, 24

Federal Communications Act of 1934, ch. 652, Title VI § 605, 48 Stat. 1064 (1934) 6

Page

OTHER AUTHORITIES

2016 Annual Report to Congress Concerning Intercepted Wire, Oral, or Electronic Communications as Required by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (2016 Wiretap Report), available at https://tinyurl.com/2016WiretapReport ..... *passim*

2016 Wiretap Report, Wire Table 4, available at https://tinyurl.com/2016WiretapReportWire4Table 15, 16

2016 Wiretap Report, Wire Table A1, Available at https://tinyurl.com/2016WiretapReportWireA1Table 16

2014 Annual Report to Congress Concerning Intercepted Wire, Oral, or Electronic Communications as Required by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (2014 Wiretap Report), available at https://tinyurl.com/2014WiretapReport 21

2015 Annual Report to Congress Concerning Intercepted Wire, Oral, or Electronic Communications as Required by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (2015 Wiretap Report), available at https://tinyurl.com/2015WiretapReport 21

Cited Authorities

Page

Albert Gidari, Stanford Law School, *Wiretap Numbers Still Don't Add Up*, available at https://tinyurl.com/WiretapNumbersDontAddUp. 15

AT&T Transparency Report First Half of 2016, available at https://tinyurl.com/ATTWireReport1stHalf2016 15

AT&T Transparency Report Second Half of 2016, available at https://tinyurl.com/ATTWireReport2dHalf2016 15

Electronic Surveillance Unit, Office of Enforcement Operations, Criminal Division, U.S. Dep't of Justice, *Electronic Surveillance Manual Procedures and Case Law* (2005), available at https://tinyurl.com/USDOJElecSurManual 18

H.R. Rep. No. 827(I), 103rd Cong., 2d Sess. (1994) 12

S. Rep. No. 1097, 90th Cong., 2d Sess. 2153 (1968) 6, 7, 17, 27

S. Rep. No. 541, 99th Cong., 2d Sess. 2 (1986) 6, 8, 12

Stephanie K. Pell, Christopher Soghoian, *Your Secret Stingray's No Secret Anymore: The Vanishing Government Monopoly over Cell Phone Surveillance and Its Impact on National Security and Consumer Privacy*, 28 Harv. J.L. & Tech. 1 (2014) . 11, 12, 13, 14

Cited Authorities

Page

T-Mobile/Metro PCS Transparency Report for 2016, available at https://tinyurl.com/TMobileWireReport.....15

Verizon Transparency Report, available at, https://tinyurl.com/VerizonWireReport 15

Sprint Transparency Report, available at https://tinyurl.com/SprintWireReport 15

William H. Erickson, et al., Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance 73 (1976) 6-7

Wiretap Orders – Stats, Title III Electronic Surveillance 1968-2015, available at, https://epic.org/privacy/wiretap/stats/wiretap_stats.html.....14

Wiretap Report, Yearly Wiretap Reports from 1997 to 2016, available at https://tinyurl.com/YearlyWiretapReports 10

Whitfield Diffie & Susan Landau, *Privacy on the Line: The Politics of Wiretapping and Encryption* (2007) 11

INTEREST OF *AMICI CURIAE*[1]

Amici are organizations committed to ensuring constitutional rights continue to be protected as technology advances and include the Electronic Frontier Foundation and National Association of Criminal Defense Lawyers. These organizations have appeared previously as *amici* before this Court. Their individual organizational statements are contained in the Appendix following this brief.

SUMMARY OF THE ARGUMENT

I. Congress and this Court have long recognized that wiretapping poses a serious threat to privacy. Indeed, in 1934, Congress initially outlawed wiretapping outright. In 1968, after renewed and intense debate, Congress passed Title III of the Omnibus Crime Control and Safe Streets Act of 1968 and permitted wiretapping, but only under the narrowest of circumstances and subject to restrictive requirements "carefully drawn to protect extremely sensitive privacy interests." *United States* v. *Ojeda Rios*, 495 U.S. 257, 268 (1990) (Stevens, J., dissenting).

The privacy concerns that animated Title III's strict limits on wiretapping have become only more acute with the proliferation of cellphones, smartphones, and Internet-based communications. Modern wiretaps

---

1. Pursuant to Supreme Court Rule 37.3(a), all parties consent to the filing of this brief. Pursuant to Supreme Court Rule 37.6, amici state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amici or their counsel made a monetary contribution to fund the preparation or filing of this brief.

frequently intercept far more information than monitoring a traditional phone call or even searching a home—the interception of our cell phones exposes to the government the digital records of "nearly every aspect of [our] lives—from the mundane to the intimate." *Riley* v. *California*, 134 S. Ct. 2473, 2490 (2014). But as communications have evolved, wiretaps have become only easier for the government. A wiretap no longer requires physical intrusion into the phone wires. Now, from the comfort of their office, government agents not only listen in on voice conversations, but also read texts and view data communications, pictures, and emails, sent from cellular phones located anywhere in the country.

Meanwhile, since Title III's passage, the number of wiretaps has ballooned. Last year, over 43 million conversations were intercepted, 93% of which were from "portable devices," largely cell phones. Meanwhile, only a small fraction of those conversations were incriminating, meaning that millions of personal and innocent conversations (and data communications) were monitored through court-ordered wiretaps. New technology thus has enhanced the already-acute privacy concerns posed by wiretapping.

II. The power and pervasiveness of new wiretapping technology makes Title III's territorial limits that much more important. Title III requires a wiretap to be authorized by a judge within the territorial location that the wiretap is placed or heard.

That territorial limitation is not a mere technicality—it is a critical component of the statute's privacy protections. Title III's territorial limits mean that the wiretap is

approved, monitored, and overseen by the court with the closest nexus to the investigation. Geographic restraints also curtail forum shopping and prevent prosecutors from seeking wiretap approval from only favorable jurisdictions.

Territorial limits further alleviate the substantial burden of review, approval, and supervision of wiretaps by dividing those duties among the various districts. Title III vests the district courts with discretion whether to issue a wiretap order, which may issue only after a robust and detailed wiretap application and affidavit that satisfies all statutory requirements. Once a wiretap commences, Title III imposes on the court rigorous supervisory responsibilities to monitor the progress of the wiretap, ensure the continued necessity of the wiretap, and confirm compliance with Title III's many strictures. If properly carried out, those statutory responsibilities require significant attention by the district court, which would be strained to the breaking point if a diminishing number of district courts became the centralized hubs for wiretaps nationwide.

Title III's territorial limits parallel similar geographic restrictions on the warrant power at common law and embodied in the Fourth Amendment, which recognized that a warrant reached only as far as the issuing official's authority. Those territorial limits persist in Federal Rule of Criminal Procedure 41, which, with few limited and enumerated exceptions, allow a magistrate judge to issue search warrants for persons or property within that judge's district. See Fed. R. Crim. P. 41(b). Our longstanding preference for geographically divided search authority is a guard against abuse that inheres in centralized power.

The government, however, has continued to dispute that Title III places any meaningful territorial limits on its authority to tap cellular phones anywhere in the country. That interpretation of Title III is incorrect and inconsistent with Title III's statutory scheme. The government's position that wiretaps of cell phones could issue from any court nationwide would drastically undercut Title III's carefully designed system of protections.

III. If law enforcement violates any of Title III's carefully drawn requirements, the statute *requires* suppression of the wiretapping evidence—a remedy that promotes compliance with Title III's extensive requirements and Congress's primary objective to limit and carefully regulate wiretaps' substantial intrusions on privacy.

ARGUMENT

I. Title III, Including Its Territorial Limitation, Was Expressly Designed To Limit Intrusion And Protect Privacy

A. Wiretaps Pose A Serious Threat To Privacy As Congress, States, And This Court Have Long Recognized

The privacy interest implicated by wiretapping is acute. Wiretaps have long been viewed as more intrusive than a physical search warrant. Wiretaps capture not only the target's words, but also any and all communications between the target and third-parties—whether or not those communications are criminal. Justice Brandeis expressed this very concern over 90-years ago in his familiar dissent in *Olmstead* v. *United States*:

> Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations between them upon any subject, and although proper, confidential, and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping.

277 U.S. 438, 475-476 (1928) (Brandeis, J., dissenting). Justice Brandeis further expressed concern that "discovery and invention" continually provides "subtle[]" and "far-reaching" means for the government to "obtain disclosure in court of what is whispered in the closet." *Id.* at 473.

Recognizing wiretaps' threat to privacy, as early as 1862, California "found it necessary to prohibit the practice by statute." See *Berger* v. *State of N.Y.*, 388 U.S. 41, 45 (1967). Other states, such as Illinois and New York, soon followed suit. *Ibid.*

Likewise, in 1934, "Congress outlawed the interception without authorization, and the divulging or publishing of the contents of wiretaps." *Berger*, 388 U.S. at 46; *Nardone* v. *United States*, 302 U.S. 379, 384 (1937) ("For years controversy has raged with respect to the morality of the practice of wire-tapping by officers to obtain evidence. It has been the view of many that the practice involves a grave wrong."). That statute made wiretapping a federal

criminal offense and made wiretap evidence inadmissible in court. Federal Communications Act of 1934, ch. 652, Title VI § 605, 48 Stat. 1064, 1103-04 (1934) (current version at 47 U.S.C. 605 (2000)).

Forty years after *Olmstead*, in *Katz* v. *United States*, 389 U.S. 347 (1967), and *Berger*, *supra*, this Court "accepted Justice Brandeis's logic" concerning the privacy and threat of wiretaps. S. Rep. No. 541, 99th Cong., 2d Sess. 2 (1986). In *Berger*, this Court recognized that "[b]y its very nature eavesdropping involves an intrusion on privacy that is broad in scope." 388 U.S. at 56.

B. With Those Privacy Concerns At The Forefront, Congress Enacted Title III To Permit Wiretaps In Only Limited Circumstances

In 1968, Congress passed The Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90–351, 82 Stat. 197, codified at 42 U.S.C. 3711. Title III of the statute (the Wiretap Act), codified at 18 U.S.C. 2510-22, authorizes government interception of wire communications only "under carefully subscribed circumstances." See S. Rep. No. 541, at 3556. Congress passed Title III with two concerns in mind: "(1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." S. Rep. No. 1097, 90th Cong., 2d Sess. 2153 (1968). The "draftsman and sponsors of Title III" further intended to "establish a system of prior review of applications for surveillance orders." William H. Erickson, et al., Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping

and Electronic Surveillance 73 (1976) (1976 Wiretap Commission). Title III imposes stringent limitations on the use of wiretapping, requiring careful adherence to its requirements.

Congress understood that "[w]iretapping and other forms of eavesdropping are recognized by even their most zealous advocates as encroachments on a man's right to privacy * * * the most comprehensive of rights and the right most valued by civilized men." S. Rep. No. 1097, at 2231; see also *id.* at 2180 ("The right here at stake—the right of privacy—is a right arising under certain provisions of the Bill of Rights and the [D]ue [P]rocess [C]lause of the 14th [A]mendment."). As the D.C. Circuit recently observed:

> The deliberations leading up to the passage of Title III reveal deep unease over the risk to privacy interests inherent in granting wiretapping authority to law enforcement. With telecommunications technology—and alongside it eavesdropping technology—evolving rapidly, members of Congress feared that if [Title III] is successful, today's narrowing enclave of individual privacy will shrink to the vanishing point.

United States v. *Scurry*, 821 F.3d 1, 9-10 (D.C. Cir. 2016) (quoting S. Rep. No. 1097, at 2232) (internal citations and quotation marks omitted). For that reason, the statute's particular requirements were "carefully drawn to protect extremely sensitive privacy interests." *Ojeda Rios*, 495 U.S. at 268 (Stevens, J., dissenting).

In 1986, Congress amended Title III to extend its restrictions to electronic communications—*i.e.*, data, text messages, and email. See generally S. Rep. No. 541. Congress recognized that communication technology had again advanced significantly and that Title III's protections had "not kept pace with the development of communications and computer technology." *Id.* at 3556. The 1986 amendments to Title III expanded the statute to cover "electronic mail operations, computer-to-computer data transmissions, cellular and cordless telephones, paging devices, and video teleconferencing." *Ibid.* Congress further recognized that Title III failed to protect the "storage and processing of information" by computers, on which many Americans came to significantly rely to "lock away a great deal of personal and business information." *Id.* at 3557. Congress recognized that "[f]or the person or business whose records are involved, the privacy or proprietary interest in that information should not change." *Ibid.* As it did when it first passed Title III, Congress again made its privacy concerns paramount:

> Most importantly, the law must advance with the technology to ensure the continued vitality of the [F]ourth [A]mendment. Privacy cannot be left to depend solely on physical protection, or it will gradually erode as technology advances. Congress must act to protect the privacy of our citizens. If we do not, we will promote the gradual erosion of this precious right.

Id. at 3559.

Title III thus broadly prohibits electronic surveillance, providing for only narrow circumstances under which law

enforcement agents may use the technique. *United States* v. *Giordano*, 416 U.S. 505, 515 (1974) (Congress "evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures were not to be routinely employed as the initial step in criminal investigation."); see also *ibid.* (Congress sought to limit the use of wiretaps by "impos[ing] important preconditions to obtaining any intercept authority at all.").

Title III imposes a strict set of rules on the application, authorization, oversight, and termination of a wiretap. Title III's requirements go far beyond the procedures for a standard search warrant. A wiretap must first be authorized by the Attorney General or another specified high-level Department of Justice official before district court approval may be sought. 18 U.S.C. 2516(1). In addition to establishing probable cause, Title III also requires an applicant to establish the necessity of the wiretap, *i.e.*, wiretapping is a tool of last resort, to be only used when all less intrusive law enforcement techniques have failed or would be futile. 18 U.S.C. 2518(1)(c). During a wiretap, law enforcement must "minimize" the interception of irrelevant conversations. 18 U.S.C. 2518(5). Wiretap orders only may remain in place for as long as necessary, and for no more than 30 days.[2] 18 U.S.C. 2518(5). And the wiretap recordings must be immediately sealed by the district court upon the wiretap's conclusion. 18 U.S.C. 2518(8)(a).

---

2. Wiretap orders may be renewed or extended, but applications for extension are subject to the same requirements and standards as the original application, with the added requirement that the government report its results obtained so far or explain why its failure to obtain results. 18 U.S.C. 2518(1)(f).

The authorizing district court is responsible for oversight of the wiretap, and courts typically require frequent, periodic reports during the duration of the order. See 18 U.S.C. 2518(6). Those reports "contain the prosecutors' summaries of telephone conversations, theories of the case, and additional investigative leads," and help the authorizing court determine what progress has been made in a criminal investigation and the need for continued interception, if any. See, *e.g.*, *Scott* v. *United States*, 436 U.S. 128, 131-32 (1978) ("The order also required the agents to * * * report to the court every five days 'the progress of the interception and the nature of the communication intercepted.'").[3]

To allow for continued public and Congressional oversight of wiretapping activities, Title III requires judges and prosecutors to report to the Administrative Office of the United States Courts (Administrative Office) broad-ranging and detailed statistics that reflect the number of wiretaps and intercepts, their type and length, and the results of wiretap investigations. See 18 U.S.C. 2519(1)-(2). The Administrative Office is required under Title III to submit a "full and complete report" of that information to Congress, which it publishes in an annual report known as the "Wiretap Report." 18 U.S.C. 2519(3); see also, *e.g.*, Wiretap Report, Yearly Wiretap Reports from 1997 to 2016.[4]

---

3. In addition, to ensure data integrity, 18 U.SC. 2518(8) requires recording of intercepted communications to prevent editing, immediate sealing, and judicially supervised custody.

4. Available at https://tinyurl.com/YearlyWiretapReports.

C. The Privacy Concerns Animating Title III Have Become More Acute With Advancing Telecommunications Technology

New communication technology and advances in wiretapping techniques have made it increasingly possible to intercept communications from anywhere in the country. The potential for intrusions into privacy that led Congress to impose Title III's strict limits on wiretapping only have increased with the growth and innovation of new technologies—cellphones, smartphones, and internet-based communication—that are at once more pervasive and more personal than traditional landlines. Our cell phones frequently contain far greater information than a simple voice call or even the search of a home might reveal. Today, cell phones contain digital records of "nearly every aspect of [our] lives—from the mundane to the intimate." *Riley*, 134 S. Ct. at 2490. But, when the government wiretaps our cellphones, those private moments are exposed to a degree that was not possible, or imagined, at the time Title III was passed.

Until relatively recently, telephones used copper wires to carry an electric current representing the sound waves of your voice. Whitfield Diffie & Susan Landau, *Privacy on the Line: The Politics of Wiretapping and Encryption* 131 (2007). Along the way, the signal was passed from the phone to the wall socket, and then through a series of wires to a local telephone exchange, where it was routed to the receiving phone. That signal was "vulnerable to wiretapping at every point along its path." *Id.* at 131. And traditional carrier-assisted wiretapping "once required that the interception take place near the target, such as at a call-switching center." Pell, 28 Harv. J.L. & Tech at 8 n.33.

The advent of "digital telephony" technology altered the transmission of communications from copper transmission to "digital transmission modes." H.R. Rep. No. 827(I), 103rd Cong., 2d Sess. (1994). Before, "intrinsic elements of wire lined networks presented access points where law enforcement, with minimum assistance from telephone companies, could isolate the communications associated with a particular surveillance target and effectuate an intercept." *Id.* at 3493-94. The digital technology, however, "complicated law enforcement's" ability to introduce a wiretap into the digital system. See *ibid.* As a result, Congress passed the Communications Assistance for Law Enforcement Act (CALEA), 47 U.S.C. 1001-1010, which required telephone companies to build "government-mandated interception capabilities * * * into their networks." Stephanie K. Pell, Christopher Soghoian, *Your Secret Stingray's No Secret Anymore: The Vanishing Government Monopoly over Cell Phone Surveillance and Its Impact on National Security and Consumer Privacy*, 28 Harv. J.L. & Tech. 1, 9 (2014).

Communication again advanced with the invention of modern cellular phones, which facilitate mobile communications "over the air on a radio frequency to a cell site." S. Rep. No. 541, at 3563. Despite the inherent mobility of cellphones, however, with the right technology and the help of the carriers through CALEA, law enforcement need not leave the comfort of their police headquarters to tap a cellular phone. See Pell, 28 Harv. J.L. & Tech. at 8-9.

Once the cellular phone carrier receives a signed wiretap order, the phone carrier simply transmits the signal both to the receiving phone and to the police

listening post simultaneously. See *United States* v. *Reed*, 575 F.3d 900, 916 (9th Cir. 2009) ("[T]he data was compiled in real time by the telephone company and transferred to the federal agents monitoring the wiretap via wire."); *United States v. McLee*, 436 F.3d 751, 764 (7th Cir. 2006) (describing how calls for "all ongoing wiretap investigations" were "initially directed to a single computer hard drive located in" the Chicago office of the Drug Enforcement Administration).[5]

Wiretaps have become even more invasive as they focus increasingly on cell phones. See 2016 Annual Report to Congress Concerning Intercepted Wire, Oral, or Electronic Communications as Required by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (2016 Wiretap Report) (93% of all wiretaps are cell phones).[6]

Communication continues to evolve with the proliferation of smartphones and the expansion of Internet-based communication. Now, "hundreds of millions" of people are communicating through smartphone "apps," such as Microsoft's Skype, Apple's FaceTime and iMessage, Google's Hangouts, and Facebook's WhatsApp. Pell, 28 Harv. J.L. & Tech. at 72. Those apps

5. Law enforcement also has the ability to capture signals "as they are transmitted over the air," or through active surveillance, using a device called an International Mobile Subscriber Identity (IMSI) Catcher, also known as a "cell site simulator." Pell, 28 Harv. J.L. & Tech. at 9, 11. The cell site simulator "trick[s] the target's phone into connecting to it" instead of a phone company's cell tower. *Ibid.* Cell site simulators can identify and locate all nearby phones—not just the target's phone—and can be configured to intercept outgoing calls and text messages. *Ibid.* (citing sources).

6. Available at https://tinyurl.com/2016WiretapReport.

use internet protocols to transmit data over "cellular data network[s], rather than the wireless carriers' legacy voice and text message systems." *Ibid.* The evolution of those new technologies, which allow many more ways to communicate, has only enhanced the privacy concerns addressed by Title III.

As this Court observed in *Riley*, "it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives." *Riley*, 134 S. Ct. at 2490. It is no surprise, therefore, that this Court recognized that cell phones are quantitatively and qualitatively different than physical searches and that cell phones "hold for many Americans 'the privacies of life.'" *Id.* at 2494-2495 (citing *Boyd* v. *United States*, 116 U.S. 616, 625 (1886)).

D. Since Title III's Passage, Wiretapping Has Drastically Expanded

Since Title III's inception, the number of wiretaps has exploded. In 1968, just 174 wiretaps were authorized. Electronic Privacy Information Center, Title III Wiretap Orders – Stats, Title III Electronic Surveillance 1968-2015.[7] By 2016, that number had ballooned to 3,168 wiretaps, according to the 2016 Wiretap Report, and potentially far more than that according to "Transparency Reports" published by telephone carriers themselves.[8]

---

7. Available at https://epic.org/privacy/wiretap/stats/wiretap_stats.html.

8. A large discrepancy exists between the wiretaps reported in the recent Wiretap Reports and the number reported in telephone carriers' transparency reports. For

The number of interceptions has likewise exploded from 400,000 in 1968 to over 43 million interceptions in 2016. Diffie, *supra*, at 213; 2016 Wiretap Report, Table A1.

The ratio of intercepted communications to incriminating communications is not encouraging. According to the Administrative Office, on average, only about 20% of intercepted conversations are incriminating. See 2016 Wiretap Report, Wire Table 4.[9] Hence, 80% of intercepted communications do not advance a criminal

---

example, the 2016 Wiretap Report identifies 3,168 wiretaps, while the telephone carriers reported 11,868. *Compare* 2016 Wiretap Report *with* AT&T Transparency Report First Half of 2016 (1,229 wiretaps), available at https://tinyurl.com/ATTWireReport1stHalf2016; AT&T Transparency Report Second Half of 2016 (1,219 wiretaps), available at https://tinyurl.com/ATTWireReport2dHalf2016, Sprint Transparency Report (2,359 wiretaps), available at https://tinyurl.com/SprintWireReport; Verizon Transparency Report (1,306 wiretaps), available at https://tinyurl.com/VerizonWireReport; T-Mobile/Metro PCS Transparency Report for 2016 (5,836 wiretaps), available at https://tinyurl.com/TMobileWireReport. Similar large discrepancies have been noted in 2014 and 2015. See Albert Gidari, Stanford Law School, ***Wiretap Numbers Still Don't Add Up***, available at https://tinyurl.com/WiretapNumbersDontAddUp ("[Administrative Office] reported 3554 wiretaps in 2014, the four major U.S. carriers reported 10,712 wiretaps implemented for the same period"); *Ibid.* ("[Administrative Office] now reports that 4,148 wiretaps were authorized in 2015 * * * [and] [t]he four major carriers (AT&T, Sprint, Verizon and T-Mobile) reported a total of 11,633 wiretaps in 2015").

9. Available at https://tinyurl.com/2016WiretapReportWire4Table. A substantial number of wiretap orders lack prosecutor's reports that contain information on, *inter alia*, the percentage of incriminating intercepts. *Ibid.*

investigation at all. See *ibid.* Some jurisdictions have lower, even dramatically lower, rates of incriminating intercepts. In 2016, for example, the federal wiretap with the most intercepted communications occurred in the Middle District of Pennsylvania involving a total of "3,292,385 cell phone conversations or messages over 60 days." 2016 Wiretap Report. But the total number of incriminating interceptions identified from that order was zero. 2016 Wiretap Report, Wire A1, Line 2685.[10] While that may be the starkest example, it is by no means the only one. There are numerous other wiretaps that intercepted tens of thousands of conversations without logging a single incriminating conversation. See, *e.g.*, 2016 *Wiretap Report*, Wire Table A1 at Rows 1600 (14,459 interceptions, zero incriminating), 1853 (13,789 interceptions, zero incriminating), 1905 (12,490 interceptions, zero incriminating), 2266 (20,667 interceptions, zero incriminating), 2686 (12,421 interceptions, zero incriminating), 2697 (12,990 interceptions, zero incriminating). The Wiretap Reports also contain many examples where the number of interceptions far exceeds the incriminating conversations. For example, in the District of Columbia, a wiretap intercepted 497,437 communications and only 807 were deemed incriminating—indicating that fully 98% of the intercepted communications were innocent communications. 2016 *Wiretap Report*, Wire Table A1 at Row 1068.

---

10. Available at https://tinyurl.com/2016WiretapReportWireA1Table.

II. Title III's Territorial Limitation Is An Important Component Of The Statute's Restrictive Framework

The power and pervasiveness of new wiretapping technology underscores the critical importance of Title III's territorial limits. Title III requires a wiretap to be authorized by a judge within the territorial location that the wiretap is placed or heard.[11] In other words, either the cell phone, the place of interception, or both, must be in the district for a wiretap to be valid under Title III. See Pet. App. 16a-17a; *United States* v. *Jackson*, 849 F.3d 540, 551-552 (3d Cir. 2017) (citing the uniform view of the courts of appeals). Title III's territorial limitation works in concert with Title III's other statutory restrictions to carry out the statute's guiding purpose: "protecting the privacy of wire and oral communications." See S. Rep. No. 1097, at 2153.

A. Title III's Territorial Limits Are Critical To The Function Of Its Statutory Scheme

Title III's territorial limitation provides important privacy protection and is crucial to the proper function of the statutory scheme, which features intensive district court and prosecutorial oversight at its core.

---

11. Title III provides that a wiretap order "authorizing, or approving the interception of wire, oral, or electronic communications" may be issued "*within the territorial jurisdiction of the court in which the judge is sitting* (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction)." 18 U.S.C. 2518(3) (emphasis added).

Adherence to Title III's strict procedures is best assured when "the jurisdiction having the strongest investigative nexus to the object in which the monitoring device is installed" oversees each intensive part of the process. See Electronic Surveillance Unit, Office of Enforcement Operations, Criminal Division, U.S. Dep't of Justice, *Electronic Surveillance Manual Procedures and Case Law* 15 (2005).[12] Stripping the territorial limitation also would undermine, if not eliminate entirely, oversight by a local, issuing court.

One way that territorial limits improve judicial oversight is by preventing the concentration of wiretaps in a few districts, which could easily become overloaded and unable to discharge the weighty review functions that Title III imposes. Those oversight functions require that the authorizing judge review the affidavit and application for probable cause, necessity and other Title III requirements, supervise the wire throughout the investigation to ensure compliance with statutory requirements,[13] approve any extensions,[14] and immediately seal wire recordings at the wiretap's conclusion.[15] Those reporting, renewal, and

12. Available at available at ht' ps://tinyurl.com/USDOJElecSurManual.

13. See 18 U.S.C. 2518(6) (progress reports must be submitted to the court at regular intervals).

14. 18 U.S.C. 2518(1)(f).

15. 18 U.S.C. 2518(8)(a) (When an interception period expires, the "recordings shall be made available to the judge issuing such order and sealed under his directions."). The seal must be placed according to the issuing court's directions "immediately." 18 U.S.C. 2518(8)(a). Some judges have required the sealing to be done in their presence. *E.g., United States* v. *Vazquez*, 605 F.2d

sealing procedures all require careful supervision and cooperation between the district court, prosecutors, and investigators.

Geographic dispersion also ensures that district court judges are able to exercise their discretion whether to approve a Title III application or not. Congress specifically declined to make mandatory the issuance of a Title III order,[16] and that discretion is a critical feature of the statute's privacy protections. Discretion only can be properly exercised if the district court has the time and attention to fully review and consider lengthy and detailed wiretap applications and affidavits with the rigor that Title III demands.

Territorial limits also promote investigators' and prosecutors' compliance with Title III's requirements. Title III has "been found to be most effective" when experienced prosecutors are "working closely with experienced investigators" and in "close cooperation." 1976 Wiretap Commission at xiv. In particular, it is important to have close monitoring between the teams to ensure that minimization requirements, ongoing necessity, and any proper investigative action (including responses to threats) are promptly and carefully carried out. Local oversight and execution of a wiretap helps fulfill those

---

1269, 1278 (2d Cir. 1979); *United States* v. *Martin*, 618 F.3d 705, 709 (7th Cir. 2010), as amended (Sept. 1, 2010). The purpose of the sealing requirement, bolstered by an in-presence requirement, is to "ensure the reliability and integrity of evidence obtained by means of electronic surveillance." See *Ojeda Rios*, 495 U.S. at 263.

16. Upon application a "judge *may* enter" a wiretap order. 18 U.S.C. 2518(3) (emphasis added).

goals by forging close communications and links between the physical surveillance teams and investigators posted in the wireroom who monitor the communications.[17]

In short, the intensive procedural requirements that are imposed to minimize intrusions on individual's privacy require close involvement between the investigators on the ground and the overseeing court. A centralized wiretapping jurisdiction or a wiretap issued from a jurisdiction far removed from the on-the-ground investigation team threatens that carefully circumscribed congressional framework.

B. Title III's Territorial Limitation Protects Privacy By Limiting Forum Shopping

Title III's territorial limitation further promotes Congress's intent to protect privacy by dissuading forum shopping to preferred judges (or even one preferred judge).

Stripping the territorial limitation would allow law enforcement "to use forum manipulation to obtain a warrant that may not be approved elsewhere." *United States* v. *North*, 735 F.3d 212, 219 (5th Cir. 2013) (DeMoss, J., concurring). For that reason, compliance with the territorial limitation is "a significant protection of privacy." *Ibid.*

---

17. During a wiretap, investigators are typically located at a listening post often referred to as a "wireroom." A wireroom is the place where the investigators monitor the communications in real time. See, *e.g.*, *United States* v. *Gordon*, 871 F.3d 35, 42 (1st Cir. 2017); *United States* v. *Emmanuel*, 565 F.3d 1324, 1327 (11th Cir. 2009).

The 1976 Wiretap Commission noted "the dangers that judge shopping presents to the fair disposition of a case may be substantial." 1976 Wiretap Commission at 73. The Commission found that it is "apparent that judge shopping with surveillance applications occurs in several jurisdictions." *Id.* at 74. Prosecutors, moreover, acknowledged to the Wiretap Commission that the "classic reason" that they sought to maneuver to a different court was to "avoid a court likely to take unfavorable action on the [wiretap] application." *Ibid.* Responding to the suggestion to limit wiretap authority to a particular judge, the Commission found that "there is a danger that the judge will come to consider himself a member of the prosecution team, with the result that the quality of judicial review will be diminished." *Ibid.*

Nonetheless, wiretap authorizations are not evenly distributed around the United States. For example, for the past three years, the District of Arizona authorized the most federal wiretaps—between 7 to 9 percent of the applications approved by federal judges over the last three years. 2016 Wiretap Report; 2015 Annual Report to Congress Concerning Intercepted Wire, Oral, or Electronic Communications as Required by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (2015 Wiretap Report);[18] 2014 Annual Report to Congress Concerning Intercepted Wire, Oral, or Electronic Communications as Required by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (2014 Wiretap Report).[19] In state courts, 82% of wiretaps were authorized in just six states, with California and New York accounting for 54% of all state wiretaps. 2016 Wiretap Report.

18. Available at https://tinyurl.com/2015WiretapReport.

19. Available at, https://tinyurl.com/2014WiretapReport.

Without a territorial limitation, there is nothing stopping any district from becoming a centralized wiretap district for the entire country. That outcome would undermine Title III's restrictive statutory scheme designed to protect privacy and to promote careful oversight of any government wiretaps.

C. Territorial Limitations Have Long Been Central To Our Nation's Laws

History teaches "that territorial restraints on the powers of magistrate judges are nothing new." *United States* v. *Krueger*, 809 F.3d 1109, 1121 (10th Cir. 2015) (Gorsuch, J., concurring); *Matter of Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.*, 829 F.3d 197, 201 (2d Cir. 2016), cert. granted sub nom. *United States* v. *Microsoft Corp.*, No. 17-2, 2017 WL 2869958 (U.S. Oct. 16, 2017) ("Warrants traditionally carry territorial limitations."). Above all, the placement of a territorial limitation in a statute "evinces a deeply rooted historical concern for limiting the territorial reach of magistrate judges' powers." *Krueger*, 809 F.3d at 1123. A centralized wiretapping forum is not in accord with this Nation's governing principles and threatens the privacy of all Americans.

Territorial limits on search warrants have deep roots in the common law and the Fourth Amendment. At common law, a "warrant issued for a search or seizure beyond the territorial jurisdiction of a magistrate's powers * * * was treated as no warrant at all." *Krueger*, 809 F.3d at 1125. The principle "animating the common law at the time of the Fourth Amendment's framing was clear: a warrant may travel only so far as the power of its issuing official."

Id. at 1124. In particular, when this Court spoke of the requirement that a warrant be issued by "magistrates empowered to issue warrants," *United States* v. *Lefkowitz*, 285 U.S. 452, 464 (1932), state and circuit courts have "[t]ime and again" interpreted that to mean that "a warrant issued in defiance of positive law's restrictions on the territorial reach of the issuing authority will not qualify as a warrant for Fourth Amendment purposes." *Krueger*, 809 F.3d at 1124 (collecting cases); *Weinberg* v. *United States*, 126 F.2d 1004, 1006 (2d Cir. 1942) (warrant issued by the Eastern District of Michigan for property in the Southern District of New York was invalid because "constitutional provisions" prohibit a district court from issuing "search warrants [that] may be used anywhere in the country").

Congress likewise has "repeatedly displayed a preference for geographically divided power," and with good reason: "ours is not supposed to be [a] government * * * with power centralized in one district, but a government of diffused and divided power, the better to prevent its abuse." *Krueger*, 809 F.3d at 1125.

Those concerns have long been present in the rules governing physical searches and seizures under the Federal Rules of Criminal Procedure. Under Rule 41, a search warrant must be issued by a "magistrate judge with authority in the district * * * to issue a warrant to search for and seize a person or property located within the district." Fed. R. Crim. P. 41(b)(1). When it was adopted in 1944, Rule 41 was a "codification of existing law and practice." Fed. R. Crim. P. 41, Advisory Committee Notes. There are only a few exceptions to that rule. Each

exception bears a nexus to the magistrate's territory[20] and each was added within the last decade and a half.[21]

---

20. The exceptions to Rule 41's territorial limitation allow a magistrate judge to issue a warrant outside the district if: (b)(2) "the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed"; (b)(3) "terrorism may have occurred" in that district; (b)(4) if a tracking device is installed within the district, then "the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both"; (b)(5) if a crime occurs in the district, a judge may issue a warrant for property outside of the jurisdiction within a U.S. territory, possession or commonwealth, a premises of a U.S. diplomatic or consular mission in a foreign state, or a residence owned or leased by the U.S. and used by a diplomatic or consular mission in a foreign state; or, (b)(6) a judge may "issue a warrant to use remote access to search electronic storage media" outside the jurisdiction in two limited situations: (A) if the location was "concealed through technological means," or, (B) in an investigation of fraud or related activity in connection with computers, the "media are protected computers that have been damaged without authorization and are located in five or more districts." Fed. R. Crim. P. 41(b).

21. Subsection (b)(3) was adopted in 2002 in response to the terror attacks of September 11, 2011 as part of the USA Patriot Act of 2001. Subsection (b)(4) was adopted in 2006 to address the use of tracking devices. Subsection (b)(5) was adopted in 2008 to cover parts of United States jurisdiction that are "outside any State or any federal district." Subsection (b)(6) was adopted in 2016 to address "two specific circumstances" where "a magistrate judge in a district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district." Fed. R. Crim. P. 41, Advisory Committee Notes.

See *Krueger*, 809 F.3d at 1121 ("[T]hat rule grants to magistrate judges the power to do certain specified things—but only if they first have 'authority within the district.'").

D. The Government Is Incorrect That Title III Imposes No Territorial Limits On Cell Phone Wiretaps

The Government nonetheless has continued to dispute that Title III places meaningful territorial limitations on cellular or mobile phone interceptions—which constitute 93% of all interceptions last year. In the court of appeals, the Government argued that the wiretap order in this case was not facially deficient because the cellular telephones were "mobile interception devices" not subject to Title III's territorial limits. Brief of Appellee, 2016 WL 4492935 at *22 (2016). Under the government's view of the statute, a federal district court or state court[22] could authorize surveillance on cell phones located anywhere in the country without any meaningful limits.

The Tenth Circuit correctly rejected that position and concluded that the term "mobile interception device" means a "listening device that is mobile." Pet App. 17a-20a. Applying the plain language of the statute, the court found that the government's interpretation, which would "treat the cell phones themselves as 'mobile interception devices'" is "impossible to square with Title III." *Id.* at

22. Title III sets a floor for any state wire, and preempts more lenient wiretap authority. Title III's jurisdictional limits therefore also prevent states from exercising nationwide authority to tap phones outside their geographic limits.

18a. The Court explained that the "cell phone is the thing being intercepted, not the thing being used to intercept the call." *Id.* at 18a-19a.

Beyond being antithetical to the language and purpose of Title III, the Government's position for nationwide jurisdiction to wiretap cellphones is simply impractical. Just last year, there were 43 million intercepted calls. A central wiretapping forum in only a handful of federal district or state courts could not appropriately handle such a volume of interceptions consistent with Title III's rigorous oversight duties including monitoring reports, minimizing innocent interceptions, ensuring continuing necessity, extensions, and sealing.

III. Congress Imposed The "Automatic Remedy" of Suppression To Enforce the Statute as a Whole

Critically, *suppression is the exclusive statutory remedy for any violation of Title III.* See 18 U.S.C. 2515 ("Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial * * * if the disclosure of that information would be in violation of this chapter."); 18 U.S.C. 2518(10)(a).[23] As the legislative history of Title III

---

23. Section 2518(10) provides in pertinent part:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to

makes clear, that statutory suppression remedy is distinct from and in addition to Fourth Amendment protection, and it "is necessary and proper to protect privacy." S. Rep. No. 1097, at 2185; see also *United States* v. *Vest*, 813 F.2d 477, 482 (1st Cir. 1987) ("[W]e believe that if Congress had intended to commit to the courts general authority to create exceptions to section 2515 in the same manner as the court might develop future exceptions to the [F]ourth [A]mendment exclusionary rule, Congress could certainly have said so more clearly."); *United States* v. *Amanuel*, 615 F.3d 117, 125 (2d Cir. 2010) (Title III provides the remedy of suppression for violations of the act that do not amount to constitutional violations).

The 1976 Wiretap Commission found that "the exclusionary evidence rule provided by Title III has been effective in constraining potentially overzealous investigators to conduct their electronic surveillances carefully within the limits of the statute's procedural requirements." 1976 Wiretap Commission at 11-12. The Commission wrote that the chance of a motion to dismiss succeeding "and an entire investigation may thereby be ruined causes investigators seeking convictions to conduct their electronic eavesdropping with the careful procedural limits of Section 2518." *Ibid.* The Commission concluded that the "exclusionary evidence rule has special impact with respect to these searches" and the Commission "believe[d] it should be retained in Title III." *Id.* Indeed,

---

this chapter, or evidence derived therefrom, on the grounds that-- (i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval.

in interpreting the 1934 federal wiretapping statute, this Court in *Nardone* v. *United States*, 302 U.S. 379, 383 (1937), "employed an exclusionary rule to deter [] violations" of the federal wiretap statute. *United States* v. *Patane*, 542 U.S. 630 n.4 (2004) (discussing *Nardone*). The Court in *Nardone* stated that "Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty." 302 U.S. at 383.

This Court has strictly applied the suppression remedy, noting that "Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures." See *Giordano*, 416 U.S. at 527-528 (suppressing wiretap because law enforcement agents failed to obtain authorization from the required high-level Department of Justice personnel); see also, *e.g.*, *Scurry*, 821 F.3d at 11 (citing to *Giordano* and ordering suppression in light of order's failure to provide identity of authorizing person); *United States* v. *Glover*, 736 F.3d 509, 513 (D.C. Cir. 2013) (citing to *Giordano* and stating that "[s]uppression is the mandatory remedy when evidence is obtained pursuant to a facially insufficient warrant. *There is no room for judicial discretion.*" (emphasis added)).

The Tenth Circuit incorrectly held that Title III's territorial limitation was not a "core concern" of Title III, and therefore that suppression was not an appropriate remedy. See *United States* v. *Dahda*, 853 F.3d 1101, 1114 (10th Cir. 2017). Assuming the "core concern" test even applies, the territorial limitation is not just surplusage

or a mere technicality; it is part of the set of carefully subscribed rules devised by Congress to govern and protect privacy. See *North*, 735 F.3d at 218 (DeMoss, J., concurring) (agreeing with defendant that "the district court's lack of territorial jurisdiction 'is not a mere 'technical defect' but is in fact a central and functional safeguard underlying [Title III].'"); *Glover*, 736 F.3d at 515 ("Nor do we think that the jurisdictional flaw in the warrant can be excused as a 'technical defect.'"). As such, suppression is not only an appropriate remedy, it is *the only* appropriate remedy.

* * * *

Wiretapping presents a significant infringement of an individual's right to privacy. That concern continues to grow as wiretapping focuses almost exclusively on cell phones, which carry an individual's most private information along with them. Even more than a search of a home, a wiretap of one's phone can reveal intimate details never imagined by the Founders of this country. Title III balances the privacy concerns against law enforcement needs by allowing wiretaps in narrow situations that are closely monitored by local judges in tandem with the local prosecutors and investigators. Territorial limitations have been recognized for centuries in the common law and the Fourth Amendment as a critical protection against unwarranted government intrusions. Congress carried forward the long-held tradition of decentralized search authority into Title III. The territorial limitation in Title III protects against government overreach by promoting judicial oversight by a local judge in the jurisdiction having the strongest investigative nexus to the monitored device, limiting forum shopping, and dispersing the burdens

and duties of wiretap supervision among the various district courts. This Court should not allow lower courts or prosecutors to disregard the territorial limitation Congress placed in Title III. A wiretap order that lacks those limits is facially invalid, and the evidence collected pursuant to that order must be suppressed under the statute.

CONCLUSION

For the reasons stated above, this Court should reverse the judgments of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

JEFFREY T. GREEN
Co-Chair Amicus Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1660 L Street, NW
Washington, DC 20036
(202) 872-8600

ILANA H. EISENSTEIN
Counsel of Record
JASON D. GERSTEIN
MARC A. SILVERMAN
DLA PIPER LLP (US)
One Liberty Place
Philadelphia, PA 19109
(215) 656-3300
ilana.eisenstein@dlapiper.com

JENNIFER LYNCH
ANDREW CROCKER
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
(415) 436-9333

Counsel for Amici Curiae

APPENDIX

APPENDIX — LIST OF *AMICI CURIAE*

The Electronic Frontier Foundation (EFF) is a nonprofit, member-supported civil liberties organization working to protect rights in the digital world. EFF actively encourages and challenges government and the courts to support privacy and safeguard individual autonomy as emerging technologies become more prevalent in society. EFF has served as amicus in multiple cases before this Court addressing Fourth Amendment protection for data and communications, including in *Carpenter* v. *United States*, 137 S. Ct. 2211 (2017) (granting certiorari), *Rios* v. *United States*, No. 16-7314 (petition for a writ of certiorari pending), *City of Los Angeles* v. *Patel*, 135 S. Ct. 2443 (2015), *Riley* v. *California*, 134 S. Ct. 2473 (2014), *Maryland* v. *King*, 133 S. Ct. 1958 (2013), *United States* v. *Jones*, 565 U.S. 400 (2012), and *City of Ontario* v. *Quon*, 560 U.S. 746 (2010).

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state

courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

No. 17-43

IN THE

Supreme Court of the United States

LOS ROVELL DAHDA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) IN SUPPORT OF PETITIONER

MARC ROTENBERG
Counsel of Record
ALAN BUTLER
ELECTRONIC PRIVACY
INFORMATION CENTER (EPIC)
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140
rotenberg@epic.org

December 7, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. **Congress enacted broad and unambiguous suppression and exclusion provisions in the Wiretap Act to minimize unlawful or unauthorized surveillance and to ensure compliance with the Act.** 3

II. **Where Congress has provided a broad and unambiguous suppression remedy, courts should not create atextual exceptions.** 9

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Agnello v. United States,
269 U.S. 20 (1925) 7

Berger v. New York,
388 U.S. 41 (1967) 3, 11

City of Arlington, Tex. v. FCC,
569 U.S. 290 (2013) 11

Elkins v. United States,
364 U.S. 206 (1960) 7, 8

Katz v. United States,
389 U.S. 347 (1967)
(Harlan, J., concurring) 11

King v. Burwell,
135 S. Ct. 2480 (2015) 11

Mapp v. Ohio,
367 U.S. 643 (1961) 6, 8

Mapp v. Ohio,
367 U.S. 643 (1961)
(Black, J., concurring) 7

Miranda v. Arizona,
384 U.S. 436 (1966) 8

Riley v. California,
134 S. Ct. 2473 (2014)
(Alito, J., concurring) 10, 11, 14

United States v. Jones,
565 U.S. 400 (2012)
(Alito, J., concurring) 10

STATUTES

Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, Title III, 18 U.S.C. §§ 2510–20

18 U.S.C. § 2510 14

18 U.S.C. § 2511 4

18 U.S.C. § 2512 4

18 U.S.C. § 2515 13

18 U.S.C. § 2516 4

18 U.S.C. § 2517 4

18 U.S.C. § 2518 4

18 U.S.C. § 2518(3) 12

18 U.S.C. § 2520 4

Communications Assistance for Law Enforcement Act, Pub. L. 103-414, 108 Stat. 4279 (1994) 11

Electronic Communications Privacy Act of 1986, Pub. L. 99-508, 100 Stat. 1848 11

Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 9

18 U.S.C. § 2710(d) 9

OTHER AUTHORITIES

Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 Duke L.J. 1 (2015) 8

David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 Minn. L. Rev. 62 (2013) 10

Edith J. Lapidus, *Eavesdropping on Trial* (1974) .. 4, 5

Edward V. Long, *The Intruders* (1967) 5

EPIC, *Wiretapping* (2017) 4

Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 Mich. L. Rev. 485 (2013) 8, 9, 10

H.R. Rep. 103-827 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3489 12

Marc Rotenberg & David Brody, *Protecting Privacy: The Role of the Courts and Congress*, Hum. Rts., March 2013 ..... 13, 14

Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365 (1983) 7, 8

S. Rep. 90-1097 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2112 ..... 4, 5, 6, 13, 14

S. Rep. 99-541 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 3555 ..... 12, 13

Samuel Dash, *The Eavesdroppers* (1959) 5

INTEREST OF THE *AMICI CURIAE*

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C.[1] EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values.

EPIC routinely participates as *amicus curiae* before this Court and other courts in cases concerning privacy issues, new technologies, and constitutional interests. *See, e.g.*, *Carpenter v. United States*, No. 16-402 (2017) (arguing that the Fourth Amendment protects the right against warrantless seizure and search of location data); *State v. Earls*, 214 N.J. 564 (2013) (same); *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (arguing that the First Amendment protects the right to access speech from the privacy of a personal electronic device); *Utah v. Streiff*, 136 S. Ct. 2056 (2016) (arguing that evidence obtained via suspicionless identification should be suppressed); *Riley v. California*, 134 S. Ct. 2473 (2014) (arguing that it is unreasonable to warrantlessly search a cell phone incident to an arrest); *Florida v. Harris*, 133 S. Ct. 1050 (2013) (arguing that the government bears the burden of establishing the reliability of new investigative techniques used in establishing probable cause for a search); *United States*

---

[1] Both parties consent to the filing of this brief. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

v. Jones, 565 U.S. 400 (2012) (arguing that warrantless tracking of a car using a GPS device violates the Fourth Amendment); *Commonwealth v. Connolly*, 454 Mass. 808 (2009) (same).

EPIC seeks to ensure that the statutory protections established by Congress to safeguard privacy are fully enforced by the courts. This case presents a fundamental question about the obligation of the courts to comply with the plain text of 18 U.S.C. § 2518(10)(a), the suppression remedy for an interception that is unlawful, supported by insufficient authorization, or not in conformity with authorization or approval. EPIC submits this *amicus* brief in support of petitioners.

SUMMARY OF THE ARGUMENT

In recent years, this Court has considered several important privacy cases, arising from new technologies, that present important constitutional questions. This is not such a case. This case is about the authority of Congress to enact statutes to safeguard privacy. The suppression and exclusion provisions in the Wiretap Act, 18 U.S.C. §§ 2515, 2518(10), are broad and unambiguous, and it is the responsibility of the courts to ensure they are enforced. Congress has made clear that wiretap orders cannot authorize surveillance beyond a court's jurisdictional boundary. Any order that does is facially invalid and triggers suppression of evidence under the plain text of § 2518(10). If the government wishes a different outcome, then it should go to Congress to revise the statute. It is not for the Court to undo the statutory provisions.

The Wiretap Act was enacted by Congress in 1968 to respond to this Court's rulings in *Berger v. New York*, 388 U.S. 41 (1967), and *Katz v. United States*, 389 U.S. 347 (1967). The purpose of the Act is to protect the privacy of communications, to strictly limit unauthorized and unlawful interception, and to ensure meaningful enforcement of statutory rights. Congress has subsequently amended the Wiretap Act on several occasions, and may choose to do so again to provide, for example, specific rules governing cell phone location information. But it is not for the courts to create atextual exceptions to the suppression and exclusion provisions in the Wiretap Act. The lower court's decision should be overturned.

ARGUMENT

I. Congress enacted broad and unambiguous suppression and exclusion provisions in the Wiretap Act to minimize unlawful or unauthorized surveillance and to ensure compliance with the Act.

The provisions for exclusion and suppression in Sections 2515 and 2518 are "integral" to the privacy regime established in the Wiretap Act. S. Rep. 90-1097, at 96 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2185 ["Senate Committee Report"]. The statutory provisions are intended to minimize unlawful or unauthorized interception and ensure compliance with the Act. There is no basis in the text, history, or purpose of the Wiretap Act for judicially manufactured limitations on the law's unambiguous provisions. In the privacy realm, the Court appropriately determines the bounds of the Fourth Amendment. But the Court should leave it to Congress to make changes to privacy protections established by statute.

The "core purpose" of the Wiretap Act is to strictly limit unlawful or unauthorized interception and to "protect the privacy of individuals by banning eavesdropping other than by duly authorized law enforcement officers who complied with the safeguards provided by the law." Edith J. Lapidus, *Eavesdropping on Trial* 7 (1974). The law accomplishes this in three distinct ways: (1) by generally prohibiting unauthorized interception and providing for civil remedies, 18 U.S.C. §§ 2511, 2520; (2) by criminally sanctioning both unlawful interception and the facilitation of unlawful interception through manufacture and distribution of "intercepting devices," 18 U.S.C. §§ 2511, 2512; and (3) by establishing specific procedures that courts and law enforcement officers must follow in order to be authorized to intercept communications in criminal investigations, 18 U.S.C. §§ 2516–18. In order to ensure that these rules would be enforced, Congress provided a full range of remedies: damages, criminal penalties, injunctive relief, and suppression of evidence derived from an unlawful or unauthorized interception. Congress also established an extensive reporting scheme to facilitate public oversight of the use of Wiretap authority. 18 U.S.C. § 2519. *See generally* EPIC, *Wiretapping* (2017).[2]

Congress made clear from the outset that the exclusionary rule is essential to the Wiretap Act's robust privacy protections and therefore should not be limited. The Senate Judiciary Committee described the broad exclusionary provision in § 2515 as "necessary and proper to protect privacy" and "an integral part of the system of limitations designed to protect privacy." Senate Committee Report, *supra*, at 96. Pri-

---

[2] https://epic.org/privacy/wiretap/.

or to 1968, the idea of authorizing interception of private communications was so controversial that Congress failed repeatedly to pass any statutes authorizing wiretapping. *See* Edward V. Long, *The Intruders* 153–54 (1967); Lapidus, *supra*, at 11.

Congress intended section 2518(10)(a)—the provision that provides standing to file a motion to suppress—to provide "the remedy for the right created by section 2515." Senate Committee Report, *supra* at 106. The Senate Committee Report cautioned that "[o]nly by striking at all aspects of the problem can privacy be adequately protected." *Id.* at 69. Accordingly, the law provides for criminal, civil, and evidentiary remedies. *Id.* These three remedies were intended "to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications." *Id.* at 96.

Congress also intended the exclusionary rule to be a sanction for those law enforcement officers that engaged in unlawful wiretapping. The report describes section 2515's exclusionary rule as an "evidentiary sanction." *Id.* The Senate report also states that the "perpetrator must be denied the fruits of his unlawful action in civil and criminal proceedings." *Id.* at 69. This indicates that Congress intended the provision to have a deterrent effect on officers, preventing future unlawful wiretapping. These strict limitations on the use of wiretap evidence are consistent with the law that existed post-*Olmstead*. *See* Samuel Dash, *The Eavesdroppers* 387–400 (1959) (discussing Section 605 of the Federal Communications Act and the early post-*Olmstead* cases interpreting the exclusionary rule).

When Congress ultimately adopted sections 2515 and 2518(10), it used unambiguous language that prohibits the use of evidence obtained in violation of Title III; those provisions should be applied broadly and without exception. The Senate indicated "that *all* unauthorized interception of such communication should be prohibited, as well as the use of the contents of unauthorized interceptions as evidence in courts and administrative hearings." Senate Committee Report, *supra*, at 89 [emphasis added]. Indeed, the only limitation on the broad exclusionary rule is the requirement that the movant be an "aggrieved person" under 18 U.S.C. § 2510(11). As the Senate Committee Report explained, they did not intend "to change the general rule" governing grand jury proceedings or "to grant jurisdiction to Federal courts over Congress itself," but provided that "[o]therwise the scope of the provision is intended to be comprehensive." Senate Committee Report, *supra*, at 106. Judicially crafted exceptions to the exclusionary rule on the basis of a change in technology would be inconsistent with this intent for a comprehensive scope.

The meaning of the exclusion and suppression provisions in the Wiretap Act are also informed by the cases that preceded their adoption. Although members of the Court have subsequently disagreed over the scope of the constitutional exclusionary rule, the statutory rule in the Wiretap Act should be interpreted based on both its text and the law as it existed in 1968. In the decade leading up to the Act's passage, the Court in *Mapp v. Ohio*, 367 U.S. 643 (1961), established that "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments." *Mapp*, 367 U.S. at 657. Justice Black's concurring opinion in *Mapp* noted that "when the Fourth

Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule." *Id.* at 662 (Black, J., concurring). The Court had previously recognized this right as stemming from a combination of Fourth and Fifth Amendment protections. *See Agnello v. United States*, 269 U.S. 20, 33–34 (1925) ("It is well settled that, when properly invoked, the Fifth Amendment protects every person from incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment.").

As Justice Stewart explained in his seminal lecture, the exclusionary rule serves an important deterrent function that is not matched by other remedies—criminal prosecutions, injunctions, and civil damages—which have a limited application in the law enforcement context. *See* Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1386–89 (1983). Criminal prosecutions are seen as a severe penalty for law enforcement officers, and thus are limited to "willful" violations. *Id.* at 1386. Injunctions require proof of widespread constitutional violations to establish likelihood of a future violation. *Id.* at 1389. And civil damages are both expensive to pursue and difficult to prove due to deference given to law enforcement officers. *Id.* at 1387–88.

Justice Stewart, writing for the Court in *Elkins v. United States*, 364 U.S. 206 (1960), found that the exclusionary rule "compel[s] respect for the

constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins*, 364 U.S. at 217. The exclusionary rule is constitutionally required not as a right "but as a remedy necessary to ensure that those prohibitions are observed in fact." Stewart, *supra*, at 1380. Whether the exclusionary rule is understood as a right enshrined in the Constitution or as a remedy that is constitutionally required to make the Fourth Amendment meaningful in practice, it was well established by 1968 that an exclusionary remedy was necessary to preserve privacy.

Congress enacted the broad exclusionary rule in the Wiretap Act following the expansion of the remedy in *Mapp v. Ohio* and prior to any of the subsequent limitations imposed in the constitutional context. After *Elkins*, *Mapp*, and *Miranda v. Arizona*, 384 U.S. 436 (1966), the broad scope and application of the suppression remedy was solidified. That is the broad principle that Congress embraced in Title III. As Professor Murphy explained, "the exclusionary rule was effectively mandated as regards Title III, because *Katz v. United States* and *Berger v. New York* had already made it clear that improper wiretapping violated the Constitution." Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 Mich. L. Rev. 485, 522 (2013).

The Court has had occasion since that time to qualify somewhat the availability of exclusion as a pure constitutional remedy. *See* Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 Duke L.J. 1, 17–20 (2015). But it is not necessary to impose new limits or qualifications on

the statutory remedy in the Wiretap Act, which have been clearly set out by Congress.

Title III is not the only statute where Congress has chosen to create a suppression remedy. In the Video Privacy Protection Act of 1988, 18 U.S.C. § 2710, Congress also enacted a broad and unambiguous exclusionary rule like the one in the Wiretap Act.

> Personally identifiable information obtained in any manner other than as provided in this section shall not be received in evidence in any trial, hearing, arbitration, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision of a State.

18 U.S.C. § 2710(d). *See* Murphy, *supra*, at 522–26.

It would raise substantial separation of powers concerns for the courts to narrow Congress' authority to enact statutory suppression remedies based on a judicial determination as to the statute's "core" purpose where there is no support in the text or history of the Act to reach such a result.

II. Where Congress has provided a broad and unambiguous suppression remedy, courts should not create atextual exceptions.

The Wiretap Act provides detailed rules that limit the government's ability to intercept private communications. Congress has since updated the law to carry forward the purpose of the 1968 Act and to reflect significant changes in the technology. As Jus-

tice Alito has explained, "In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way." *United States v. Jones*, 565 U.S. 400, 427–28 (2012) (Alito, J., concurring) (internal citations omitted). This process of technological refinement in statutory privacy law, where Congress defines protections and courts apply those definitions to emerging technologies, is ongoing and important.

Congress also has the ability to conduct detailed fact-finding and develop clear rules set out in public law. Professors Gray and Citron write, "the law enforcement and privacy interests at stake can be explored in a more expansive and timely manner in the context of legislative or executive rule making processes than they can be in the context of constitutional litigation." David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 Minn. L. Rev. 62, 110 (2013). Professor Murphy has stated, "Congress has proven more adept than the courts at implementing mechanisms for systemic oversight of privacy practices, as well as for reform of noncompliant institutions." Murphy, *supra*, at 535.

Congress looks to the Court's constitutional guidance to enact privacy legislation "that draws reasonable distinctions based on categories of information or [] other variables." *Riley v. California*, 134 S. Ct. 2473, 2497 (2014) (Alito, J., concurring). As Justice Alito explained in *Riley*, "The regulation of electronic surveillance provides an instructive example" of Congress's complementary role in defining

privacy protections. *Id.* In 1967, the Court struck down a New York statute because it permitted electronic eavesdropping "without requiring belief that any particular offense ha[d] been or [was] being committed" and without requiring that the "conversations [sought] be particularly described." *Berger v. New York*, 388 U.S. 41, 58-59 (1967). Later that term, the Court held that warrantless eavesdropping on a telephone booth violated the Fourth Amendment because it intruded on the caller's reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 358-59 (1967); *id.* at 360 (Harlan, J., concurring).

This Court has recognized the importance of judicial deference and treading carefully so as not to usurp the role of Congress. Chief Justice Roberts emphasized that, "in every case we must respect the role of the Legislature, and take care not to undo what it has done." *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015). Justice Scalia cited Justice Brennan in cautioning "judges [] to refrain from substituting their own interstitial lawmaking." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 304–05 (2013) (citing *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980)). Where Congress has gone through the effort of creating a broad and unambiguous suppression remedy, as it has done in the Wiretap Act, the Court should heed deference to Congress.

Since Title III was enacted in 1968, Congress has passed several amendments to the Wiretap Act, including the Electronic Communications Privacy Act of 1986, Pub. L. 99-508, 100 Stat. 1848 ["ECPA"], and the Communications Assistance for Law Enforcement Act, Pub. L. 103-414, 108 Stat. 4279 (1994) ["CALEA"]. Congress passed ECPA to "update and

clarify Federal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies." S. Rep. 99-541, at 1 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 3555, 3555. Eight years later, Congress again amended the law, in part, to extend protections "to cordless phones and certain data communications transmitted by radio." H.R. Rep. 103-827, at 10 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3489, 3490. In both instances, Congress made the determination that changes in technology had altered the communications landscape in a way that required legislative action.

But Congress has not amended the Wiretap Act to provide for authorization of interception across jurisdictional boundaries. The district court's attempt to do so was a direct violation of the statute, making the order facially invalid. Congress clearly knew how to provide authority for cross-jurisdictional wiretapping where it determined that such authorization was proper. In ECPA, Congress both extended Wiretap Act protections to electronic communications and provided specific authority for the interception of oral communications across jurisdictional boundaries in a specific, narrow context: where law enforcement sought to use a "mobile tracking device." 18 U.S.C. § 2518(3).

The "mobile tracking device" provision was enacted for a specific purpose: to enable the authorization to use "a tap" that is "installed on a vehicle." S. Rep. 99-541, *supra*, at 30. Congress recognized that "[i]n certain cases . . . a device authorized for installation in an automobile may be authorized in one district and the vehicle might be moved to another district prior to installation." *Id.* Congress decided in

ECPA that, with an appropriate court order, the government has the authority to complete "installation in the district to which the vehicle has been moved." *Id.* This is precisely the type of narrow solution to a specific problem that Congress is capable of enacting when necessary.

But if a court simply ignores the jurisdictional limitation altogether by refusing to enforce the exclusionary rule when it is violated, then Congress would never have the occasion to review and update the law. Indeed, it is directly contrary to Congress' intent for the court to deny the remedy outlined in the statute (suppression of evidence) even when the jurisdictional limitation provision was violated. Suppression of evidence acquired in violation of Title III is not optional, it is required under the statute. 18 U.S.C. § 2515. Accordingly, the courts should defer to Congress to make any changes to the statutory scheme in response to emerging technologies, rather than adopt an atextual exemption by judicial fiat.

The Court and Congress have long worked together to determine the scope of the right to privacy. Marc Rotenberg & David Brody, *Protecting Privacy: The Role of the Courts and Congress*, Hum. Rts., March 2013, at 7, 10. ("Both courts and Congress share responsibility for safeguarding individuals' privacy from advancing technology and overzealous government surveillance."). The Wiretap Act was drafted in response to this Court's opinions in *Berger* and *Katz*. The drafters considered the cases to be authoritative pronouncements of the necessary procedures for constitutional wiretaps. *See* S. Rep. 90-1097 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2153 (asserting "[i]n the course of the [*Berger*] Opinion the

Court delineated the constitutional criteria that electronic surveillance legislation should contain. Title III was drafted to meet these standards").

In drafting Title III, Congress expressly relied on the factors that the Court set out in *Berger*. S. Rep. 90-1097, 73-75 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2161–63 ("Working from the hypothesis that any wiretapping and electronic surveillance legislation should include . . . constitutional standards, the subcommittee has used the *Berger* and *Katz* decisions as a guide in drafting title III."). "It was the Court's decision in 1967 that set the course for the modern right to privacy, but it was the congressional legislation the following year that gave meaning to that right." Rotenberg & Brody, *supra*.

It is for the Court to determine the scope of the Fourth Amendment. Congress has codified these decisions into statutes. Title III, for example, "authorizes but imposes detailed restrictions on electronic surveillance." *Riley*, 134 S. Ct. at 2497; *see* 18 U.S.C. § 2510.

Since the enactment of the Wiretap Act, "electronic surveillance has been governed primarily, not by decisions of this Court, but by the statute." *Riley*, 134 S. Ct. at 2497. If Congress has chosen a broad and unambiguous suppression remedy for violations of the Wiretap Act, then it is not for the courts to create atextual exceptions.

CONCLUSION

For the foregoing reasons, EPIC respectfully asks this Court to reverse the decision of the U.S. Court of Appeals for the Tenth Circuit.

Respectfully submitted,

MARC ROTENBERG
ALAN BUTLER
ELECTRONIC PRIVACY
INFORMATION CENTER (EPIC)
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140
(202) 483-1248 (fax)
rotenberg@epic.org

December 7, 2017

No. 17-43

In The
Supreme Court of the United States

LOS ROVELL DAHDA and
ROOSEVELT RICO DAHDA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit**

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

JOHN W. WHITEHEAD
DOUGLAS R. MCKUSICK
THE RUTHERFORD INSTITUTE
923 Gardens Blvd.
Charlottesville, VA 22901
(434) 978-3888

ERIN GLENN BUSBY
Counsel of Record
LISA R. ESKOW
727 East Dean Keeton Street
Austin, TX 78705
(713) 966-0409
ebusby@law.utexas.edu

December 7, 2017

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. TITLE III EVOLVED AGAINST THE BACKDROP OF PUBLIC CLAMOR FOR EFFECTIVE LIMITS ON ELECTRONIC INTERCEPTIONS OF COMMUNICATIONS 4

II. AS GROWING PUBLIC DEMAND FOR PROTECTION FROM WIRETAPPING FUELED LEGISLATIVE AND EXECUTIVE-BRANCH RESPONSES, THIS COURT ALSO SHAPED ITS DOCTRINE TO PROTECT INDIVIDUALS FROM IMPROPER INTERCEPTION OF PRIVATE COMMUNICATIONS 12

III. CONGRESS ENACTED TITLE III TO LIMIT WIRETAPPING, RELYING ON JUDICIAL OVERSIGHT TO SHARPLY CURTAIL INTERCEPTED COMMUNICATIONS 18

A. Title III Was the Product of Years of Increasingly Impassioned Opposition to Wiretapping in the House and Senate 20

TABLE OF CONTENTS – Continued

Page

B. Congress Designed a Comprehensive Scheme for Regulating Wiretapping at Federal and State Levels, Assigning a Geographically Limited Gatekeeping Role to Judges 23

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Berger v. New York, 388 U.S. 41 (1967) .....*passim*

Boyd v. United States, 116 U.S. 616 (1886).....4

Coolidge v. New Hampshire, 403 U.S. 443 (1973).....25

Gelbard v. United States, 408 U.S. 41 (1972).....18

Goldman v. United States, 316 U.S. 129 (1942)..... 12, 13, 14, 18

Irvine v. California, 347 U.S. 128 (1954).....14

Katz v. United States, 389 U.S. 347 (1967)..... 12, 18, 20

Lopez v. United States, 373 U.S. 427 (1963).....15

Nardone v. United States, 302 U.S. 379 (1937).....13

Nardone v. United States, 308 U.S. 338 (1939).....13

Olmstead v. United States, 277 U.S. 438 (1928) ... 12, 13, 18

Osborn v. United States, 385 U.S. 323 (1966) 15, 18

Silverman v. United States, 365 U.S. 505 (1961).....14, 15

United States v. Giordano, 416 U.S. 505 (1974).... 17, 19, 25

United States v. Jackson, 839 F.3d 540 (3d Cir. 2017) 26

Wong Sun v. United States, 371 U.S. 471 (1963).....15

CONSTITUTION AND STATUTES

U.S. CONST. amend. IV .....*passim*

18 U.S.C. § 2510(9).....19, 24

18 U.S.C. § 2518 25

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 2518(1) 19, 24
18 U.S.C. § 2518(1)(c) 28
18 U.S.C. § 2518(2) 28
18 U.S.C. § 2518(3) ..... *passim*
18 U.S.C. § 2518(4) 19, 28
18 U.S.C. § 2518(5) 19, 29
18 U.S.C. § 2518(6) 19, 28
18 U.S.C. § 2518(8) 29
18 U.S.C. § 2518(8)(a) 19
18 U.S.C. § 2518(8)(b) 19
18 U.S.C. § 2518(8)(c) 19
18 U.S.C. § 2518(8)(d) 19
18 U.S.C. § 2518(10)(a) 19, 29
18 U.S.C. § 2518(10)(a)(ii) 1, 4, 19, 30

LEGISLATIVE MATERIALS AND GOVERNMENTAL SOURCES

113 Cong. Rec. 17891 (1967) 29
114 Cong. Rec. 16300 (1968) 23
Anti-Crime Program: Hearings on H.R. 5037, H.R 5038, H.R. 5384, H.R. 5385, and H.R. 5386 Before Subcomm. No. 5 of the H. Comm. on the Judiciary, 90th Cong. (1967) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Controlling Crime Through More Effective Law Enforcement: Hearings on S. 300, S. 552, S. 580, S. 674, S. 675, S. 678, S. 798, S. 824, S. 916, S. 917, S. 992, S. 1007, S. 1094, S. 1194, S. 1333, and S. 2050 Before the Subcomm. on Criminal Laws & Procedures of the S. Comm. on the Judiciary, 90th Cong. (1967) 17, 22, 27

Federal Communications Act, ch. 652, 48 Stat. 1103 (1934) (rewritten by Title III of the Omnibus Crime Act of 1968, 82 Stat. 22, § 803 (1968)) 13, 20

Invasions of Privacy (Gov't Agencies): Hearings Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary, 89th Cong. (1965) 10

H.R. 5037, 90th Cong. (1967) 21, 23

H.R. 5386, 90th Cong. (1967) 21, 23

Hearings on H.R. 408 Before Subcomm. No. 3 of the H. Comm. on the Judiciary, 83d Cong. (1953) 9

President Lyndon B. Johnson, *Annual Message to the Congress on the State of the Union, January 10, 1967*, LBJ PRESIDENTIAL LIBR. (June 6, 2007), http://www.lbjlibrary.net/collections/selected-speeches/1967/01-10-1967.html 11, 20

NAT'L COMM'N FOR THE REVIEW OF FED. & STATE LAWS RELATING TO WIRETAPPING & ELECTRONIC SURVEILLANCE, ELECTRONIC SURVEILLANCE (1976) 19

TABLE OF AUTHORITIES – Continued

Page

Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197-239 (1968) 22, 23

S. 675, 90th Cong. (1967) 22, 23, 25

S. 917, 90th Cong. (1967) 23

S. 2050, 90th Cong. (1967) 22, 23, 25

S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112 ..... *passim*

THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT & THE ADMIN. OF JUST., TASK FORCE REP.: ORGANIZED CRIME (1967) 25, 26

THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUST., THE CHALLENGE OF CRIME IN A FREE SOC'Y (1967) 12

Wiretapping and Eavesdropping Legislation: Hearings on S. 1086, S. 1221, S. 1495, and S. 1822 Before the Subcomm. on Constitutional Rts. of the S. Comm. on the Judiciary, 87th Cong. (1961) 10

OTHER MATERIALS

BYRON H. ALDEN ET AL., COMPETITIVE INTELLIGENCE: INFORMATION, ESPIONAGE, AND DECISION-MAKING (1959) 8

Russell Baker, *Treacherous Vegetables*, MIAMI NEWS, Feb. 23, 1965, at 64 10

TABLE OF AUTHORITIES – Continued

Page

Your Olive May Quote You If Snoopers Know You Drink, BALT. SUN, Feb. 19, 1965, at 1 10

ROBERT M. BROWN, THE ELECTRONIC INVASION (2d ed. 1975) 8-9

SAMUEL DASH, RICHARD F. SCHWARTZ & ROBERT E. KNOWLTON, THE EAVESDROPPERS (1959) ..... *passim*

Carl Dreher, *The Enemy Is Listening*, 1960 THE NATION 54 6

Michael Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance*, 74 J. CRIM. L. & CRIMINOLOGY 1 (1983) .. 29-30

Brian Hochman, *Eavesdropping in the Age of* The Eavesdroppers*; or, The Bug in the Martini Olive*, POST45 (Feb. 3, 2016), http://post45.research.yale.edu/2016/02/eavesdropping-in-the-age-of-the-eavesdroppers-or-the-bug-in-the-martini-olive 5

Frank S. Hogan, *An Answer to the Authors*, 50 J. CRIM. L. & CRIMINOLOGY 575 (1960) 6-7

PATRICIA HOLT, THE BUG IN THE MARTINI OLIVE, AND OTHER TRUE CASES FROM THE FILES OF HAL LIPSET, PRIVATE EYE (1991) 10

E. JEREMY HUTTON & JOHNNY H. KILLIAN, THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT: BACKGROUND AND SUMMARY OF ITS PROVISIONS (1968) 22, 23

EDITH J. LAPIDUS, EAVESDROPPING ON TRIAL (1974) 10, 20

TABLE OF AUTHORITIES – Continued

Page

EDWARD V. LONG, THE INTRUDERS: THE INVASION OF PRIVACY BY GOVERNMENT AND INDUSTRY (1966) 9

Mairi MacInnes, *An Attack on Privacy*, 1960 COMMENT. 274, *available at* https://www.commentarymagazine.com/articles/the-eavesdroppers-by-samuel-dash-robert-e-knowlton-and-richard-f-schwartz/ 6

STANDARDS RELATING TO ELECTRONIC SURVEILLANCE (AM. BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIM. JUST., Tentative Draft 1968) 26, 27

Laurence Stern, *Don't Talk to a Martini, Olive May Be Listening*, WASH. POST, Feb. 19, 1965, at A1 10

UNITED STATES SENATE, https://www.senate.gov/artandhistory/history/common/generic/People_DashSam.htm (last visited Dec. 3, 2017) 6

Alan F. Westin, *Wire Tapping*, 1960 COMMENT. 333, *available at* https://www.commentarymagazine.com/articles/wire-tapping/ 7

INTEREST OF *AMICUS CURIAE*[1]

Amicus The Rutherford Institute, a nonprofit civil-liberties organization, is deeply committed to protecting the constitutional freedoms of every American and the fundamental human rights of all people. The Rutherford Institute advocates for protection of civil liberties and human rights through both *pro bono* legal representation and public education on a wide spectrum of issues affecting individual freedom in the United States and around the world.

As a central part of its mission, The Rutherford Institute advocates against unnecessary government intrusions into citizens' privacy, fighting to prohibit the government from engaging in unreasonable searches and seizures under the guise of detecting and deterring crime. To ensure the vitality of the right to individual privacy in the course of criminal investigations, The Rutherford Institute believes that Title III's suppression remedy should be enforced strictly, in accordance with the plain language of 18 U.S.C. § 2518(10)(a)(ii) and Title III's original purpose—to limit the government's ability to invade individuals' privacy through wiretapping.

---

[1] The parties have consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Title III was Congress's long-brewing response to two decades of escalating societal, political, and judicial concerns over developments in surveillance technology and its threat to individual privacy. Deliberately crafted as a general prohibition on wiretapping, Title III includes a narrow exception for law enforcement that permits interceptions of citizens' private communications only under highly limited and heavily regulated circumstances. The history, structure, and plain text of Title III reinforce the narrowness of the law-enforcement exception, as well as the importance of judicial oversight through rigorous scrutiny of wiretap applications, ongoing supervision of wiretap orders, and congressionally mandated suppression of evidence collected in violation of Title III's requirements.

During the 1950s and 1960s, the American public became increasingly aware of the threat to privacy posed by wiretapping and bugging, as a series of exposés educated citizens on scandalous uses of this technology by private individuals, corporations, and law enforcement. Public outrage led to calls for the outlawing of all wiretapping activities, with opposition to use of the technology coming not only from citizens but also from Congress and The White House.

At the same time, this Court was shaping Fourth Amendment doctrine to address the same concerns over technological advances threatening privacy. After initially permitting any interception of communications

that occurred physically outside a protected area, the Court held in the 1960s that private communications are in fact protected by the Fourth Amendment. Thus, any intrusion on the privacy of those communications would have to meet requirements analogous to those applied to physical searches. This doctrine—and the explicit overturning of a notoriously abused New York statute that gave more leeway for law-enforcement wiretapping—called the legality of most governmental wiretapping into question.

It was against that backdrop of public outcry and this Court's decisions regarding private communications that Congress took up the question of regulating wiretapping. After a number of hearings on bills that ultimately were not enacted, Congress settled on the painstakingly detailed statutory scheme that became Title III. That scheme first outlaws wiretapping and other electronic interceptions of communications. It then provides a narrowly circumscribed exception for law enforcement, available only if a judge confirms the government's compliance with substantive and logistical, statutorily prescribed requirements. In addition to demonstrating probable cause and the ineffectiveness of alternative investigative procedures, a wiretap application also must include detailed descriptions of the type of communications to be intercepted, the person making the communications, and the location of the proposed interception. Importantly, the judge, who may authorize interceptions only within the territorial jurisdiction of her court, continues supervision of any approved interceptions—from requiring progress

reports up to excluding any evidence gathered in violation of the statute. This geographically anchored, judicial gatekeeping role was designed not only to prevent forum shopping, but also to actively effectuate the purpose of the statute—protecting citizens from unwarranted intrusions on their private communications. The suppression remedy in 18 U.S.C. § 2518(10)(a)(ii) is vital to that purpose and should be enforced as written, precluding prosecutors from using evidence of communications intercepted pursuant to a facially insufficient order.

ARGUMENT

I. TITLE III EVOLVED AGAINST THE BACKDROP OF PUBLIC CLAMOR FOR EFFECTIVE LIMITS ON ELECTRONIC INTERCEPTIONS OF COMMUNICATIONS.

Title III arose from a period in which Americans increasingly recognized that changing technologies threatened a bedrock principle of American society: the right to individual privacy. Individual privacy has been protected under the law since before the founding of the Nation and was enshrined in the Fourth Amendment's guarantee that the people shall "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV; *see Boyd v. United States*, 116 U.S. 616, 626-27 (1886). Less than a century after that constitutional promise, however, improvements in technology began to quietly and quickly erode privacy rights, unbeknownst

to many Americans. *See, e.g.*, *Berger v. New York*, 388 U.S. 41, 49 (1967). The creation of the telegraph in the nineteenth-century, which allowed individuals to communicate electronically, ushered in an era of electronic eavesdropping and—once exposed to the American people—a growing suspicion of the government's ability to intercept private communications.[2] *See* SAMUEL DASH, RICHARD F. SCHWARTZ & ROBERT E. KNOWLTON, THE EAVESDROPPERS 23, 26-29 (1959).

By the mid-twentieth century, Americans had been subjected to over one-hundred years of wiretapping at the hands of law-enforcement officials, corporations, and even other private citizens. *Id.* at 34. In the summer of 1956, amidst growing concern about the proliferation of wiretapping and its disparate treatment by states, The Pennsylvania State Bar Association commissioned a nationwide study into various wiretapping practices, laws, devices, and techniques. *Id.* at 5. The results of this yearlong study were widely publicized with the 1959 release of *The Eavesdroppers*, which thrust the one-hundred-year history of wiretapping's invasive practice into the spotlight and brought the debate of how to protect Americans' privacy from wiretapping to the forefront of all

---

[2] For a colorful account of this history, including illustrations of eavesdropping tools mentioned in this brief, such as the legendary "pry martini" cocktail bug, discussed *infra* at 10, see Brian Hochman, *Eavesdropping in the Age of* The Eavesdroppers*; or, The Bug in the Martini Olive*, POST45 (Feb. 3, 2016), http://post45.research.yale.edu/2016/02/eavesdropping-in-the-age-of-the-eavesdroppers-or-the-bug-in-the-martini-olive.

branches of government. *See generally* DASH ET AL., *supra*.[3]

Publication of *The Eavesdroppers* created national uproar and fueled the public outrage against wiretapping that had been simmering throughout the twentieth century. *See id.* at 87-90. As a reviewer in *The Nation* observed, *The Eavesdroppers* portrayed America as a "thoroughly unpleasant society." Carl Dreher, *The Enemy Is Listening*, 1960 THE NATION 54, 55 (reviewing DASH ET AL., *supra*). The reviewer in *Commentary* characterized the police actions described in the book as "the functions of a secret, or political, police" and warned that "the health of the society is obviously jeopardized." Mairi MacInnes, *An Attack on Privacy*, 1960 COMMENT. 274, 275 (reviewing DASH ET AL., *supra*), *available at* https://www.commentarymagazine.com/articles/the-eavesdroppers-by-samuel-dash-robert-knowlton-and-richard-f-schwartz/.[4] Writing a month later, another

---

[3] The Pennsylvania State Bar Association's $50,000 endowment to study national wiretapping practices funded an objective, fact-finding study led by attorney Samuel Dash, a former Philadelphia prosecutor. DASH ET AL., *supra*, at 5. *The Eavesdroppers*, a 441-page report published about the findings of this study, looked at wiretapping practices of both law enforcement and private citizens in New York, Boston, Pennsylvania, California, Illinois, and Louisiana. *Id.* at 8. Mr. Dash would later go on to become chief counsel for the Senate Watergate Committee. UNITED STATES SENATE, https://www.senate.gov/artandhistory/history/common/generic/People_DashSam.htm (last visited Dec. 3, 2017).

[4] Reception of *The Eavesdroppers* was not uniformly positive. For example, one Manhattan district attorney who had initially cooperated with Dash stated that in writing *The Eavesdroppers* the authors "grind their axe upon a wheel of un-truth and far-fetched speculation." Frank S. Hogan, *An Answer to the Authors*,

essayist in *Commentary* applauded the reaction to the controversy, observing that "the most satisfying aspect of the wiretapping revolt . . . is the proof that Americans value their constitutional privacy too highly to let it ebb away before an advancing technology or the forays of official and unofficial intruders." Alan F. Westin, *Wire Tapping*, 1960 COMMENT. 333, 340 (reviewing DASH ET AL., *supra*), *available at* https://www.commentarymagazine.com/articles/wire-tapping/.

The Eavesdroppers recounted and revealed to Americans a world of scandal and deception that shocked the nation and rocked the Capital, in particular. The book exposed that, in the mid-1930s, federal investigators discovered that a major private business had placed wiretaps on the telephones of this Court's Justices. DASH ET AL., *supra*, at 29. Knowledge of the wiretaps was hidden from this Court, even after its discovery by federal agents. *Id.* And other branches of the federal government were not immune from similar intrusions. Americans learned that wiretapping in the nation's Capital was suspected throughout the 1950s, with one of the most notable instances coming to light in 1951, when Congress learned that Washington's police lieutenant had tapped the phones of a United States Senator. *Id.* at 32.

Public outcry heightened with the realization that the largest group of wiretapping victims was undoubtedly private citizens. *The Eavesdroppers* and other

---

50 J. CRIM. L. CRIMINOLOGY 575, 575 (1960) (reviewing DASH ET AL., *supra*).

reports revealed how far reaching interceptions of private communications had become. For example, *The Eavesdroppers* gave the details behind a 1955 scandal, revealing that a single New York wiretapping facility—set up by an attorney with the help of rogue phone-company employees—was capable of intercepting communications from over 100,000 telephones.[5] *Id.* at 83-85. A contemporaneous Harvard Business School study reported that a growing number of companies were using wiretapping to spy on competitors and their own employees. BYRON H. ALDEN ET AL., COMPETITIVE INTELLIGENCE: INFORMATION, ESPIONAGE, AND DECISION-MAKING 69-70 (1959); *see also* DASH ET AL., *supra*, at 95-96.

During the 1960s, a number of other books addressed the issues covered by *The Eavesdroppers*, expanding the documentation of widespread interceptions of citizens' private communications. Some books suggested that up to one-third of divorce cases in major American cities involved evidence obtained by bugging, and many businesses, including up to 100% in some industries, had purchased audio-surveillance equipment to spy on competitors. ROBERT M. BROWN,

---

[5] The attorney used the wiretaps (which covered "an exceedingly fashionable section of midtown Manhattan") to collect specific evidence requested by clients, but he also "would at times, on his own initiative, approach wealthy persons he knew were having domestic difficulties and offer his wiretapping services. He would actually sample telephone conversations to obtain incriminating bits of evidence which he could use as a selling point when he approached a prospective [client]." DASH ET AL., *supra*, at 85-87.

THE ELECTRONIC INVASION 23-24 (2d ed. 1975) (1st ed. published in 1967); EDWARD V. LONG, THE INTRUDERS: THE INVASION OF PRIVACY BY GOVERNMENT AND INDUSTRY 17 (1966).

Perhaps the most shocking examples of wiretapping, though, involved use of the technology by law enforcement. Telephone companies had been secretly helping the police conduct wiretaps in Boston, Chicago, and New Orleans, with the understanding that the police would not disclose the telephone companies' cooperation to the public. DASH ET AL., *supra*, at 122-23 (describing this practice in New Orleans); *id.* at 154 (describing this practice in Boston); *id.* at 219 (describing this practice in Chicago). In states like California—which had already banned law-enforcement wiretapping in response to public outcry—police would hire private contractors to install wiretaps so that police could claim *they* were not violating state wiretapping laws. *Id.* at 164. And in states like New York—where law-enforcement wiretapping required a court order—prosecutors would avoid taking wiretap orders to judges who refused to issue them, "quickly learn[ing] which judges [would] be more receptive to their applications, and consistently tak[ing] them to these judges." *Id.* at 45. In 1953, a Deputy Attorney General who was a former New York prosecutor testified to the Committee on the Judiciary for the House that local requirements for getting a court order afforded little protection from wiretapping. *Id.* at 67 (citing *Hearings on H.R. 408 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 83d Cong. 37 (1953)).

By the early 1960s, Congress started considering action to curtail wiretapping. Four wiretapping bills were introduced in early 1961, but none passed. *Wiretapping and Eavesdropping Legislation: Hearings on S. 1086, S. 1221, S. 1495, and S. 1822 Before the Subcomm. on Constitutional Rts. of the S. Comm. on the Judiciary*, 87th Cong. 1-8 (1961); *see also* EDITH J. LAPIDUS, EAVESDROPPING ON TRIAL 11 (1974). In hearings on another bill in 1965, Harold Lipset, a private investigator, pretended to sip a dirty martini while testifying, and then played back his testimony—supposedly recorded by a transmitter camouflaged as the olive in the martini.[6] *Invasions of Privacy (Gov't Agencies): Hearings Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 89th Cong. 13-21 (1965) (statement of Harold K. Lipset, private detective). As might be imagined, this caused quite a stir. *See* Russell Baker, *Treacherous Vegetables*, MIAMI NEWS, Feb. 23, 1965, at 64; *Your Olive May Quote You If Snoopers Know You Drink*, BALT. SUN, Feb. 19, 1965, at 1; Laurence Stern, *Don't Talk to a Martini, Olive May Be Listening*, WASH. POST Feb. 19, 1965, at A1.

The public outrage against this invasion of privacy culminated in President Johnson's 1967 State of the Union Address, where he called on Congress to "outlaw wiretapping—public and private—whenever and

---

[6] The recording was actually from a microphone hidden in a flower arrangement (apparently, the martini set-up was not reliable). PATRICIA HOLT, THE BUG IN THE MARTINI OLIVE, AND OTHER TRUE CASES FROM THE FILES OF HAL LIPSET, PRIVATE EYE 67 (1991). The martini glass also held no liquid, to keep the microphone from shorting out. *Id.*

wherever it occurs, except when the security of the Nation itself is at stake—and only then with the strictest safeguards." President Lyndon B. Johnson, *Annual Message to the Congress on the State of the Union, January 10, 1967*, LBJ PRESIDENTIAL LIBR. (June 6, 2007), http://www.lbjlibrary.net/collections/selected-speeches/1967/01-10-1967.html.

Attorney General Ramsey Clark shared the President's sentiment, stating that "over a period of 6 years the Department has come more and more to the view that wiretapping should be prohibited." *Anti-Crime Program: Hearings on H.R. 5037, H.R 5038, H.R. 5384, H.R. 5385, and H.R. 5386 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 90th Cong. 38 (1967) [hereinafter *Anti-Crime Program Hearings*] (statement of Ramsey Clark, Attorney General, United States). When testifying before a House Subcommittee of the Judiciary, Attorney General Clark warned of the dangers of wiretapping with a description that likely hit close to home for many in his audience: With current technology, a person enjoying cocktails at an elegant Washington watering hole could have his conversations recorded and transmitted by a device that appeared to be his drinking partner's cufflinks, or even (according to Hal Lipset) the olive in his martini. *See id.* at 211.

The President's Commission on Law Enforcement and Administration of Justice summed it up in its report on the challenge of crime in a free society: "The present status of the law with respect to wiretapping

and bugging is intolerable." THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUST., THE CHALLENGE OF CRIME IN A FREE SOC'Y 203 (1967).

II. AS GROWING PUBLIC DEMAND FOR PROTECTION FROM WIRETAPPING FUELED LEGISLATIVE AND EXECUTIVE-BRANCH RESPONSES, THIS COURT ALSO SHAPED ITS DOCTRINE TO PROTECT INDIVIDUALS FROM IMPROPER INTERCEPTION OF PRIVATE COMMUNICATIONS.

Over the half century leading up to the enactment of Title III, this Court faced the challenge of applying constitutional protections to changing surveillance technology. At first, it applied concepts of trespass more suited to search or seizure of tangible objects. *See, e.g.*, *Goldman v. United States*, 316 U.S. 129, 133-36 (1942); *Olmstead v. United States*, 277 U.S. 438, 464-66 (1928). But, by 1967, it arrived at a framework designed to protect individuals from unreasonable searches of private communications—the framework that would underlie much of Title III. *See Katz v. United States*, 389 U.S. 347, 354-59 (1967); *Berger v. New York*, 388 U.S. 41, 54-60 (1967).

This Court tracked the law of trespass when it decided its first wiretap case in 1928, determining that protection from interceptions of electronic communications would have to come from legislative action, not the Fourth Amendment. *See Olmstead*, 277 U.S. at 465. In *Olmstead*, this Court held that there had been no

search or seizure when federal officers gathered evidence of illegal alcohol sales by inserting small wires into the telephone lines running from the defendants' residences or offices to the telephone company, because the telephone wires were "not part of [the defendants'] house or office." *Id.* at 465. This Court concluded that the "reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house, and messages while passing over them, are not within the protection of the Fourth Amendment." *Id.* at 466. At the same time, however, this Court pointed out that "Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials." *Id.* at 465.

Congress responded to this suggestion in 1934, specifically prohibiting the interception without authorization of telephone communications. Federal Communications Act, ch. 652, 48 Stat. 1103 (1934) (rewritten by Title III of the Omnibus Crime Act of 1968, 82 Stat. 22, § 803 (1968)). This Court then extended the exclusionary rule to wiretap evidence offered in violation of the statute. *Nardone v. United States*, 308 U.S. 338, 341 (1939); *Nardone v. United States*, 302 U.S. 379, 384 (1937).

This Court first addressed "bugging" (using a listening device rather than a true wiretap) in 1942. *Goldman v. United States*, 316 U.S. 129 (1942). In *Goldman*, the police had placed a "detectaphone" against an office wall to hear conversations in the office on the other side of the wall. *Id.* at 131. Once again, this Court

looked to the law of trespass and concluded there was no Fourth Amendment violation because there was no physical intrusion into the office. *Id.* at 135.

In 1954, this Court again affirmed a conviction based on evidence gathered with a bug. *Irvine v. California*, 347 U.S. 128 (1954). Although there was no question that a physical intrusion occurred—police had broken into the premises to place the listening device—this Court allowed the conviction to stand because the exclusionary rule did not apply to state courts. *Id.* at 137. Despite affirming the conviction, the opinion included striking language signaling a new level of concern over the use of bugs, which this Court described as "frightening instruments of surveillance and invasion of privacy, whether by the policeman, the blackmailer, or the busy-body." *Id.* at 132.

Less than a decade later, this Court held for the first time that "eavesdropping" could violate the Fourth Amendment. *Silverman v. United States*, 365 U.S. 505 (1961). In *Silverman*, the police had used a "spike mike"—a microphone mounted at the end of a foot-long spike that was inserted into a party wall until it could pick up conversations in the adjoining house through the heating ducts. *Id.* at 506. Transitioning away from a pure focus on physical intrusion, this Court clarified that its decision did "not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area." *Id.* at 512.

Following from *Silverman*, this Court explicitly stated two years later that overheard oral statements are subject to the exclusionary rule. *Wong Sun v. United States*, 371 U.S. 471, 487 (1963). Although this Court went on to permit use of electronically recorded conversations in two cases from the early 1960s, *Lopez v. United States*, 373 U.S. 427 (1963), and *Osborn v. United States*, 385 U.S. 323 (1966), this Court's admissibility analysis was strikingly different from its approach in earlier opinions. In *Lopez*, this Court upheld use of a recorded conversation between a federal agent and the defendant because the recording "was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose." 373 U.S. at 439. In *Osborn*, this Court again took a restrictive approach in considering the admissibility of statements obtained when a potential witness wore a recording device that was authorized only under "the most precise and discriminate circumstances," 385 U.S. at 329, for a "narrow and particularized purpose," *id.* at 330. Because the search met the same requirements this Court would apply in the case of a physical search, it allowed the use of the recording. *Id.*

It was against this backdrop that this Court issued its opinion in *Berger v. New York*, 388 U.S. 41 (1967), creating the legal framework that would underlie much of Title III. *Berger* involved a challenge to the admissibility of evidence collected through a wiretap

conducted in accordance with a New York statute that permitted wiretaps by police

> upon "oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof * * * ." The oath must state "that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and * * * identifying the particular telephone number or telegraph line involved."

Id. at 54.

Despite the particularities required for a wiretap order, this Court held that the interceptions violated the Fourth Amendment, finding the New York statute constitutionally deficient for a number of reasons. *See id.* at 58-60. First, the statute did not require a belief that any particular offense had been committed, and it did not require that the conversations sought to be seized "be particularly described." *Id.* at 58-59. Second, the authorization of a wiretap for two months was "the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause." *Id.* at 59. Third, "the statute place[d] no termination date on the eavesdrop once the conversation sought is seized." *Id.* And, finally, the statute did not overcome the problem of a lack of notice (inherent, of course, in a

search that depends on secrecy) "by requiring some showing of special facts." *Id.* at 60.

By dissecting the New York statute in this manner, this Court effectively laid out a blueprint for regulating wiretapping consistent with constitutional demands. Indeed, at least one commentator suggested that this Court's approach in *Berger* was critical to shaping the legislation that followed. Professor G. Robert Blakey, who drafted a model statute that in fact became the foundation for much of Title III, stated that, if this Court had not reversed the conviction in *Berger*, "the likelihood is that the New York statute would have become the model and would have been copied and enacted by other States and the National Congress." *Controlling Crime Through More Effective Law Enforcement: Hearings on S. 300, S. 552, S. 580, S. 674, S. 675, S. 678, S. 798, S. 824, S. 916, S. 917, S. 992, S. 1007, S. 1094, S. 1194, S. 1333, and S. 2050 Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary*, 90th Cong. 957 (1967) [hereinafter *Controlling Crime Hearings*] (statement of G. Robert Blakey, Professor, Notre Dame Law School); *see also United States v. Giordano*, 416 U.S. 505, 518 (1974) (describing Professor Blakey as "the draftsman of the bill containing the basic outline of Title III"). In Professor Blakey's view, the Court "struck it down in such a way that they could write, in effect, an advisory opinion to the Congress and the States on the kind of statute they would like to see." *Controlling Crime Hearings*, *supra*, at 957.

Six months after *Berger*, this Court issued its opinion in *Katz v. United States*, explicitly rejecting the reliance in *Olmstead* and *Goldman* on the physical placement of the recording device, focusing instead on whether an individual has a reasonable expectation of privacy in his conversations. 389 U.S. 347, 351-53 (1967). This Court reiterated that "under sufficiently 'precise and discriminate circumstances,' a federal court may empower government agents to employ a concealed electronic device 'for the narrow and particularized purpose of ascertaining the truth of the * * * allegations' of a 'detailed factual affidavit alleging the commission of a specific criminal offense.'" *Id.* at 355 (quoting *Osborn*, 385 U.S. at 329-30). Thus, while this Court established the protected status of private conversations, it left the door open for carefully circumscribed law-enforcement incursions on this zone of privacy. The ball was now in Congress's court.

III. CONGRESS ENACTED TITLE III TO LIMIT WIRETAPPING, RELYING ON JUDICIAL OVERSIGHT TO SHARPLY CURTAIL INTERCEPTED COMMUNICATIONS.

Congress enacted Title III in the wake of escalating societal, political, and judicial concerns over burgeoning surveillance technology and its threat to individual privacy. By outlawing all interceptions of communications except those expressly permitted by statute, Title III unambiguously established that "the protection of privacy was an overriding congressional concern." *See Gelbard v. United States*, 408 U.S. 41,

48 (1972); *see also Giordano*, 416 U.S. at 514. A critical reflection of that congressional concern was the particularized, restrictive requirements defining the limited circumstances under which a wiretap order could be obtained by law enforcement. *See, e.g.*, 18 U.S.C. § 2518(1), (3)-(6), (8)(a)-(d); *id.* § 2510(9). As such, "Title III takes the form of a series of limitations and prohibitions on lawful eavesdropping: the 'do's' are largely the residue of multitudinous 'don'ts.'" NAT'L COMM'N FOR THE REVIEW OF FED. & STATE LAWS RELATING TO WIRETAPPING & ELECTRONIC SURVEILLANCE, ELECTRONIC SURVEILLANCE 4 (1976).

The suppression remedy in 18 U.S.C. § 2518(10)(a), including the evidentiary sanction for facially insufficient wiretap orders in § 2518(10)(a)(ii), is an integral part of Congress's comprehensive scheme to outlaw unchecked eavesdropping, prescribing definitive consequences for evidence impermissibly obtained through interception "don'ts." *See id.*; S. Rep. No. 90-1097 (1968), at 96, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2185 (describing the suppression remedy as "an integral part of the system of limitations designed to protect privacy"); *see also* 18 U.S.C. § 2518(10)(a). That statutory remedy, and deterrent, should be strictly enforced pursuant to its plain text to effectuate Congress's deliberate, thoroughly considered response to the clamor over wiretapping that proliferated throughout American society and all branches of government, coming to a head with the enactment of Title III.

A. Title III Was the Product of Years of Increasingly Impassioned Opposition to Wiretapping in the House and Senate.

Prior to the enactment of Title III, the only federal statute addressing wiretapping was section 605 of the Federal Communications Act of 1934, which was generally ineffective. EDITH J. LAPIDUS, EAVESDROPPING ON TRIAL 11 (1974). Although in 1961 the Kennedy Administration endorsed a proposal to authorize wiretapping in cases of national security, organized crime, and other serious crimes, nothing tangible resulted. *Id.* at 12. As previously mentioned, highly publicized hearings began in 1961 before the Permanent Subcommittee on Investigations headed by Senator John McClellan, but Congress took no action on President Kennedy's proposal. *Id.* Further hearings were conducted in the mid-1960s, but no legislation was passed. *See id.*

When the 90th Congress met in 1967, legislators could no longer avoid acting as widespread outrage over wiretapping swept the nation. The public uproar over wiretapping, President Johnson's 1967 State of the Union Address urging Congress to "outlaw wiretapping—public and private" unless required for national security, President Lyndon B. Johnson, *Annual Message to the Congress on the State of the Union, January 10, 1967*, LBJ PRESIDENTIAL LIBR. (June 6, 2007), http://www.lbjlibrary.net/collections/selected-speeches/1967/01-10-1967.html, and this Court's pending decisions in *Berger* and *Katz* all weighed heavily on the legislative agenda. Revelations into the extent of

wiretapping sparked concern from the highest-ranking members of Congress, such as Representative Emmanuel Celler, the Chairman of the House Judiciary Committee, who noted that wiretapping and electronic surveillance had by 1967 "become most obnoxious," arguing that such practices sanctioned an invasion of privacy that "[n]o liberty-loving nation should tolerate." *Anti-Crime Program Hearings*, *supra*, at 23.

Thus, when the House Judiciary Committee conducted hearings for the "Safe Streets and Crime Control Act of 1967" (H.R. 5037, 90th Cong. (1967)), it dedicated two days of testimony to H.R. 5386, the "Right to Privacy Act," which dealt with wiretapping and electronic eavesdropping. *See Anti-Crime Program Hearings*, *supra*, at 79; *see also* H.R. 5386, 90th Cong. (1967). H.R. 5386 would have prohibited all willful interceptions or attempts to intercept wire communications without the consent of at least one of the parties to the communications, as well as any unconsented-to electronic eavesdropping (i.e., bugging) unless such practices were authorized by the President as "necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power or any other serious threat to the security of the United States." H.R. 5386, 90th Cong. §§ 2511, 2514 (1967). Furthermore, even in the case of the "national security" exception, the Act would have prohibited the admission of any information obtained by the wiretap or electronic eavesdropping into evidence in any judicial or administrative proceeding, and expressly prohibited divulging or using such information "except as

necessary to implement [the electronic surveillance]." *Id.* § 2514; *see also* E. JEREMY HUTTON & JOHNNY H. KILLIAN, THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT: BACKGROUND AND SUMMARY OF ITS PROVISIONS 21 (1968).

Meanwhile, the Senate was drafting its own legislation to curb wiretapping and electronic eavesdropping. On January 25, 1967, Senator John McClellan, the Democratic Chairman of the Senate Judiciary Committee, introduced S. 675, which would have "prohibit[ed] all wiretapping except pursuant to Presidential order for national security purposes" and "where authorized by court order, under strict procedural safeguards, for the purpose of the investigation or prosecution of certain crimes." S. 675, 90th Cong. §§ 3-6 (1967); *Controlling Crime Hearings*, *supra*, at 76. Furthermore, on June 29, 1967, Senator Roman Hruska, a Republican, introduced S. 2050, which, like Senator McClellan's proposed bill, would have prohibited wiretapping unless done to investigate certain specified crimes by duly authorized law-enforcement officers or where authorized by the President where national security made such surveillance necessary. S. 2050, 90th Cong. §§ 2511, 2515-17 (1967). In both bills, the admission into evidence of any information obtained was explicitly prohibited unless it had been collected through surveillance practices in accordance with the proposed legislation. S. 675 § 6; S. 2050 § 2517.

Although the law that became the Omnibus Crime Control and Safe Streets Act of 1968—of which Title

III is a part—was based on H.R. 5037, the anti-wiretapping provision played an essential part in the passage of the bill in the Senate. When the House sent H.R. 5037 to the Senate on August 8, 1967, it included only the "Safe Streets and Crime Prevention Act of 1967"; the anti-wiretapping provisions in H.R. 5386 were absent entirely. The Senate, however, chose to substantially amend its companion to H.R. 5037—S. 917—by including language from both Senator McClellan and Senator Hruska's anti-wiretapping bills. *See* HUTTON & KILLIAN, *supra*, at 21-22 (explaining that Title III was added to S. 917 by the Senate Judiciary Committee as "essentially a combination of S. 675 . . . and S. 2050"). The Senate then passed S. 917 and substituted its text for that of H.R. 5037, which was then sent back to the House. *Id.* at 1. The Omnibus Crime Control bill was passed on June 16, 114 Cong. Rec. 16300 (1968), and Title III took effect on June 19, 1968. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197-239 (1968).

B. Congress Designed a Comprehensive Scheme for Regulating Wiretapping at Federal and State Levels, Assigning a Geographically Limited Gatekeeping Role to Judges.

Confronted with the ominous backdrop of the rapid expansion of wiretaps, Congress adopted legislation that would sharply curtail electronic surveillance at all levels of government. Congress understood that Title III would create a "dual system" of federal and

state law enforcement, with Title III's new, rigorous requirements serving as a baseline for states that sought to pass wiretap acts of their own. *See Anti-Crime Program Hearings*, *supra*, at 1380 (statement of G. Robert Blakey, Professor, Notre Dame Law School) (explaining the dual system of wiretapping and the changes needed to bring New York's wiretap statute into compliance with Title III).

The recent publicity surrounding wiretaps, which had revealed the prevalence of forum shopping, made clear to Congress that the key to an effective statutory limitation on wiretapping would be a "scrupulous system of impartial court authorized supervision." S. Rep. No. 90-1097, at 225 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2122, 2274; *see Anti-Crime Program Hearings*, *supra*, at 1379 (statement of Professor Blakey) ("One of the criticisms of the New York System is the New York police can go to 'easy judges.' . . . This bill attempts to meet that objection . . . ."). As part of the judicial-oversight solution to forum shopping, Congress included a requirement permitting only a "judge of competent jurisdiction" to receive an application and issue a wiretap order. 18 U.S.C. § 2518(1). Congress defined a judge of competent jurisdiction as a judge of a United States district court or court of appeals and a judge of any court of general criminal jurisdiction of a state that is authorized by state statute to issue wiretap orders, *id.* § 2510(9)—a notably narrower group than those empowered to grant standard search warrants, which is defined by the broader standard of a

"neutral and detached magistrate." *See Coolidge v. New Hampshire*, 403 U.S. 443, 449-50 (1973).

Congress took the requirement that a wiretap order issue only from a judge of competent jurisdiction from a presidential task force report prepared by Professor Blakey, which contained a draft bill including this geographic limitation. *Compare* 18 U.S.C. § 2518, *with* THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT & THE ADMIN. OF JUST., TASK FORCE REP.: ORGANIZED CRIME, App. C, at 109 (1967). The "judge of competent jurisdiction" language, later incorporated into S. 675 and S. 2050, *see Giordano*, 416 U.S. at 517 n.7, was understood as permitting approval of a wiretap order only by a judge who oversaw the territory in which the communications took place. *Anti-Crime Program Hearings*, *supra*, at 1379 (statement of Professor Blakey) (explaining that a "judge of competent jurisdiction" for a hypothetical crime that occurred in San Francisco would be "either the chief judge in the California District Court or the chief judge of the [N]inth [C]ircuit.").

Congress further narrowed the field of judges authorized to receive and issue wiretap orders by limiting the geographical scope of interceptions, specifying that a judge of competent jurisdiction may authorize interception of wire, oral, or electronic communications only "within the territorial jurisdiction of the court in which the judge is sitting."[7] 18 U.S.C. § 2518(3). The

[7] Using modern technology, it is arguably possible to "intercept" communications with a "listening post" in a jurisdiction

requirement that an order be approved by a geographically limited district or appellate judge, or the state counterpart (as opposed to the additional officials authorized to grant standard search warrants) was "intended to guarantee responsible judicial participation in the decision to use these techniques." S. Rep. No. 90-1097, at 91 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2179.

Additionally, Congress allowed for judicial discretion to ensure that even when wiretap requests complied with statutory requirements, they could be denied by judges of competent jurisdiction in the interests of justice and privacy. *See* THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT & THE ADMIN. OF JUST., TASK FORCE REP.: ORGANIZED CRIME, 102-03; 18 U.S.C. § 2518(3). As the authors of the *Standards Relating to Electronic Surveillance* (a group that included Professor Blakey) noted, "there will be situations where a technically adequate showing of probable cause might

---

other than the jurisdiction in which the communications are initially made. *See, e.g.*, *United States v. Jackson*, 839 F.3d 540, 551 (3d Cir. 2017). At the time Title III was enacted, however, the interception would have had to be made relatively near the device being "tapped." *See Anti-Crime Program Hearings*, *supra*, at 1379 (statement of Professor Blakey); DASH ET AL., *supra*, at 314, 322. At the time, there were two primary methods of tapping a phone line: The wiretapper could install a tap directly onto the wires of the victim's terminal box (direct tapping), or install an inductive device in close proximity to the phone or the terminal box of the victim (inductive tapping). DASH ET AL., *supra*, at 314, 320. For direct tapping, the listener had to be within blocks of his victim, and for inductive tapping, the listener had to be within mere feet. *Id.* at 314, 322.

be made out yet where a concrete balance of the interests of privacy and justice might indicate that surveillance should not be authorized"; in such situations, "the judicial officer ought to have the power . . . to refuse to grant the order based on his evaluation of all the facts and circumstances . . . ." STANDARDS RELATING TO ELECTRONIC SURVEILLANCE 146 (AM. BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIM. JUST., Tentative Draft 1968). This grant of judicial discretion was understood by some as a safeguard against electronic surveillance that obviated the need to limit wiretap orders to the investigation of only specific crimes: As J. Edward Lumbard, Chief Judge of the Second Circuit, explained to the Senate, there was no need for such a requirement because "the judge to whom the [wiretap] application is made can be expected to exercise sound discretion about approving its use unless a strong showing of need is made in cases of lessor importance." *Controlling Crime Hearings*, *supra*, at 172. This important role of the judiciary was adopted by the drafters of Title III and reflects congressional understanding of the need for extensive judicial involvement in regulating wiretap requests. *See* S. Rep. No. 90-1097, at 225 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2274.

For example, as part of the power to approve a wiretap order, 18 U.S.C. § 2518(3), a judge of competent jurisdiction must ensure that an application includes, among other things, "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to

be unlikely to succeed if tried or to be too dangerous." *Id.* § 2518(1)(c). Upon receiving the application, the judge may require that the applicant furnish additional testimony or documentary evidence if the judge deems it necessary, or she may grant or deny an ex parte order. *Id.* § 2518(2), (3). To grant the order, the judge must determine that: (1) there is probable cause for belief that an individual is committing, has committed, or is about to commit an offense; (2) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception; (3) normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried or to be too dangerous; and (4) there is probable cause for belief that the facilities or place where the communications are to be intercepted are being used, or about to be used, in connection with the offense. *Id.* § 2518(3).

The judge's role does not end, moreover, once the decision is made to grant an application. In the order, the judge must specify details such as the person whose communications are to be intercepted, the location of the authorized interception, the type of communication sought to be intercepted, the agency authorized to intercept the communications, and the period of time for which such interception is authorized. *Id.* § 2518(4). In addition, the judge may require reports detailing both the progress made toward the achievement of the objective and the need for continued interception to be made at intervals determined by the judge. *Id.* § 2518(6). Judges are also granted discretion to

authorize time extensions and to seal recordings upon expiration of the order. *Id.* § 2518(5), (8). And, importantly, § 2518(10)(a) assigns judges the critical gatekeeping role of suppressing evidence obtained in violation of Title III's strict requirements. *See id.* § 2518(10)(a). This "elaborate and comprehensive system of checks and safeguards," including "provisions for the suppression of evidence when gathered improperly," was viewed as essential "to protect individual privacy, curb abuses by law-enforcement officers and assure the rights and liberties" of criminal targets. 113 Cong. Rec. 17891, 17948 (1967) (statement of Rep. Poff).[8]

As such, the effectiveness of Title III's scheme depends on "the responsible part that the judiciary must play in supervising the interception of wire or oral communications in order that the privacy of innocent persons may be protected." S. Rep. No. 90-1097, at 89 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2117. As one commentator noted, "Title III's sponsors clearly recognized that society's right to privacy would depend, in large part, upon this system of statutory controls and that these controls, in turn, were dependent upon proper judicial implementation." Michael Goldsmith, *The Supreme Court and Title III: Rewriting the*

---

[8] It has been suggested that the suppression remedy actually has a greater deterrent effect in the case of electronic surveillance, which requires advance planning, than in the case of most unlawful searches, in which decisions are made "on the spot." Michael Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance*, 74 J. CRIM. L. & CRIMINOLOGY 1, 40 n.223 (1983).

Law of Electronic Surveillance, 74 J. CRIM. L. & CRIMINOLOGY 1, 44 (1983) (citing S. Rep. No. 90-1097, at 225 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2274).

Only by enforcing these statutory controls as intended, and as plainly written, by Congress can this Court ensure that Title III's bulwark against government encroachments on individual privacy remains intact. The suppression remedy in § 2518(10)(a)(ii) is an essential component of Congress's deliberately crafted scheme for protecting privacy in the face of evolving interception technology, and the statute is unambiguous in its clear requirement that the judiciary, in its critical gatekeeping role, prohibit prosecutors from using evidence obtained pursuant to a facially insufficient order.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

JOHN W. WHITEHEAD
DOUGLAS R. MCKUSICK
THE RUTHERFORD INSTITUTE
923 Gardens Blvd.
Charlottesville, VA 22901
(434) 978-3888

ERIN GLENN BUSBY
Counsel of Record
LISA R. ESKOW
727 East Dean Keeton Street
Austin, TX 78705
(713) 966-0409
ebusby@law.utexas.edu

December 7, 2017